Supreme Court, U.S.
FILED

93 1446 FEB 17 1994

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES
(OCTOBER 1993 TERM)

RENATE CRETAN (Widow of JOHN CRETAN), et al.,

Petitioners,

vs.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, and BETHLEHEM STEEL CORPORATION,

Respondents.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Victoria Edises, Esq., Counsel of Record
Dianna Lyons, Esq.
KAZAN, McCLAIN, EDISES & SIMON
A Professional Law Corporation
171 Twelfth Street, Third Floor
Oakland, California 94607
Telephone: (510) 465-7728

Attorneys for Petitioners
RENATE and NICOLE CRETAN

10 4 PM

QUESTIONS PRESENTED

1. Whether an injured worker's dependents [spouse and children] are "persons entitled to" death benefits under Longshore and Harbor Workers' Compensation Act (LHWCA) § 33(g) and *Cowart v. Nicklos Drilling Co.*, 112 S.Ct. 2589 (1992) if they settle a tort action during the injured worker's life, without prior employer approval.

2. Whether the Ninth Circuit's *Cretan* decision, in conjunction with *Cowart*, defeat the Longshore and Harbor Workers' Compensation Act's humanitarian purpose and the congressional design to encourage employers to compensate injured workers.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii
JURISDICTIONAL STATEMENT iv
STATUTORY PROVISIONS v

I. STATEMENT OF THE CASE 1
II. ARGUMENT 2
A. REVIEW IS URGENTLY NECESSARY BECAUSE THE NINTH CIRCUIT'S *CRETAN* DECISION DEFIES THE PLAIN MEANING OF THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT AND THIS COURT'S *COWART V. NICKLOS* DRILLING CO. OPINION 3
B. REVIEW IS URGENTLY NECESSARY BECAUSE THE NINTH CIRCUIT ERRONEOUSLY INTERPRETED LHWCA § 33(g) TO WAIVE STATUTORY RIGHTS BEFORE THEY VEST 5
C. REVIEW IS URGENTLY NECESSARY BECAUSE THE NINTH CIRCUIT'S DECISION EGREGIOUSLY UNDERMINES CONGRESS' CAREFULLY BALANCED, § 33, STATUTORY SCHEME AND FEDERAL POLICY 7
III. CONCLUSION 11

TABLE OF AUTHORITIES

Cases	Page(s)
Branham v. Terminal Shipping Co., 136 F.2d 655 (4th Cir. 1943)	6
Campbell v. Holt, 115 U.S. 620 (1885)	5
Cowart v. Nicklos Drilling Co., ___ U.S. ___, 112 S.Ct. 2589, 120 L.Ed.2d 379 (1992)	passim
Cretan v. Bethlehem Steel Corporation, Director, OWCP, 1 F.3d 843 (9th Cir. 1993)	passim
Director, OWCP v. Palmer Coking Coal Co. ('Manowski'), 867 F.2d 552 (9th Cir. 1989)	4
Director, OWCP v. Perini North River Assocs., 459 U.S. 297 (1983)	4
Force v. Director, OWCP, 938 F.2d 981 (9th Cir. 1991)	4
Gibson v. ITO Corporation of Ameriport, 18 BRBS 162 (1986)	10
K-Mart Corp. v. Carrier, Inc., 486 U.S. 281 (1988)	3
Long v. Director, OWCP, 767 F.2d 1578 (9th Cir. 1985)	4
McDonald v. Director, OWCP, 897 F.2d 1510 (9th Cir. 1990)	4
Mills v. Marine Repair Service, 22 BRBS 335 (1989)	10
Pearsall v. Great N.R. Co., 161 U.S. 646 (1896)	5
Todd Shipyards Corp. v. Witthahn, 569 F.2d 899 (9th Cir. 1979)	6
Voris v. Eikel, 346 U.S. 328 (1953)	4

Statutes	Page(s)
28 U.S.C. § 1254(1)	iv
33 U.S.C. § 902(14)	6
33 U.S.C. § 902(16)	6
33 U.S.C. § 902(18)	6
33 U.S.C. § 904(a)	8
33 U.S.C. § 905(a)	7
33 U.S.C. § 913(a)	2, 6
33 U.S.C. § 921(c)	2
33 U.S.C. § 933	3, 7
33 U.S.C. § 933(a)	7
33 U.S.C. § 933(b)	7
33 U.S.C. § 933(c)	7
33 U.S.C. § 933(d)	8
33 U.S.C. § 933(e)	8
33 U.S.C. § 933(f)	1, 8
33 U.S.C. § 933(g)	passim
33 U.S.C. § 933(h)	8
33 U.S.C. § 933(i)	8
33 U.S.C. § 938(a)	7

Other Authority

Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation* (1960) 73 Harv.L.Rev. 692 5

JURISDICTIONAL STATEMENT

This Court has Title 28, U.S.C. § 1254(1) jurisdiction to review the Ninth Circuit's July 28, 1993 *Cretan v. Bethlehem Steel Corporation, Director, Office of Workers' Compensation Programs (OWCP)* (90-70589/90-70634) decision [1 F.3d 843 (9th Cir. 1993)] and November 19, 1993 order denying reconsideration.

STATUTORY PROVISIONS

Longshore and Harbor Workers' Compensation Act (LHWCA), **[33 U.S.C. § 901, et seq.**

§ 2(16) [33 U.S.C. § 902(16)] The terms "widow or widower" includes only the decedent's wife or husband living with or dependent for support upon him or her *at the time of his or her death*; or living apart for justifiable cause or by reason of his or her desertion at such time.

§ 4 (a) [33 U.S.C. § 904(a)] Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 7, 8, and 9. In the case of an employer who is a subcontractor, only if such subcontractor fails to secure the payment of compensation shall the contractor be liable for and be required to secure the payment of compensation. A subcontractor shall not be deemed to have failed to secure the payment of compensation if the contractor has provided insurance for such compensation for the benefit of the subcontractor.

§ 5 (a) [33 U.S.C. § 905(a)] The liability of an employer prescribed in section 4 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the Act, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment,or that the injury was due to the contributory negligence of the employee. For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 4.

§ 13 (a) [33 U.S.C. § 913(a)] Except as otherwise provided in this section, the right to compensation for disability or death under this Act shall be barred unless a claim therefore is filed within one year after the injury or death. If payment of compensation has been made without an award on account of such injury or death, a claim may be filed within one year after the date of the last payment. Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or death occurred. The time for filing a claim shall not begin to run until the employee or beneficiary is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury or death and the employment.

§ 19 (a) [33 U.S.C. § 919(a)] Subject to the provisions of section 13 a claim for compensation may be filed with the deputy commissioner in accordance with regulations prescribed by the Secretary at any time after the first seven days of disability following any injury, or at any time after death, and the deputy commissioner shall have full power and authority to hear and determine all questions in respect to such claims.

§ 33 (a) [33 U.S.C. § 933(a)] If on account of a disability or death for which compensation is payable under this Act the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

(b) Acceptance of compensation under an award in a compensation order filed by the deputy commissioner, an administrative law judge, or the Board shall operate as an assignment to the employer of all rights of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after acceptance. If the employer fails to commence an action against such third person within ninety days after the cause of action is assigned under this section, the right to bring such action shall revert to the person entitled to compensation. For the purpose of this

subsection the term "award" with respect to a compensation order means a formal order issued by the deputy commissioner, an administrative law judge, or Board.

(c) The payment in section 44 shall operate as an assignment to the employer of all right to the legal representative of the deceased (hereinafter referred to as "representative") to recover damages against such third person.

(d) Such employer on account of such assignment may either institute proceedings for the recovery or such damages or may compromise with such third person either without or after instituting such proceeding.

(e) Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

(1) The employer shall retain an amount equal to—

(A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner or Board);

(B) the cost of all benefits actually furnished by him to the employee under section 7;

(C) all amounts paid as compensation;

(D) the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by the Secretary, and the present value of the cost of all benefits thereafter to be furnished under section 7, to be estimated by the deputy commissioner, and the amounts so computed and estimated to be retained by the employer as a trust fund to pay such compensation and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative; and

(2) The employer shall pay any excess to the person entitled to compensation or to the representative.

(f) If the person entitled to compensation institutes proceedings within the period prescribed in section 33(b), the employer shall be required to pay as compensation under this Act a sum equal to the excess of the amount which the Secretary determines is payable on such third person. Such net amount shall be equal to the actual amount recovered less the expenses reasonably incurred by such person in respect to such proceedings (including reasonable attorneys' fees).

(g)(1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) for an amount less than the compensation to which the person (or the person's representative) would be entitled under this Act, the employer shall be liable for compensation as determined under subsection (f) only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.

(2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this Act shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this Act.

(3) Any payments by the special fund established under section 44 shall be a lien upon the proceeds of any settlement obtained from or judgment rendered against a third person referred to under subsection (a). Notwithstanding any other provision of law, such lien shall be enforceable against such proceeds, regardless of

whether the Secretary on behalf of the special fund has agreed to or has received actual notice of the settlement or judgment.

(h) Where the employer is insured and the insurance carrier has assumed the payment of the compensation, the insurance carrier shall be subrogated to all the rights of the employer under this section.

(i) The right to compensation or benefits under this Act shall be the exclusive remedy to an employee when he is injured, or to his eligible survivors or legal representatives if he is killed, by the negligence or wrong of any other person or persons in the same employ: Provided, That this provision shall not affect the liability of a person other than an officer or employee of the employer.

§ 38(a) [33 U.S.C. § 938(a)] Any employer required to secure the payment of compensation under this Act who fails to secure such compensation shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than $10,000, or by imprisonment for not more than one year, or by both such fine and imprisonment; and in any case where such employer is a corporation,the president, secretary, and treasurer thereof shall be also severally liable to such fine or imprisonment as herein provided for the failure of such corporation to secure the payment of compensation; and such president, secretary, and treasurer shall be severally personally liable, jointly with such corporation, for any compensation or other benefit which may accrue under the said Act in respect to any injury which may occur to any employee of such corporation while it shall so fail to secure the payment of compensation as required by section 32 of this Act.

I. STATEMENT OF THE CASE

In 1942 and 1943, John Cretan suffered asbestos exposure during maritime employment with Bethlehem Steel Corporation (Bethlehem). Asbestos induced mesothelioma caused his January 6, 1984 disability and in April 1984, Mr. Cretan filed a Longshore and Harbor Workers' Compensation Act (LHWCA) claim for disability benefits. Bethlehem denied his claim and paid nothing.

Mr. Cretan sued various asbestos manufacturers for his past and future wage loss, his pain and suffering and for punitive damages. His wife, Renate, sued for her loss of consortium. During 1984, the last full year of John Cretan's life, he and Renate accepted the tort defendants' demand that they waive Renate's and Nicole's potential right to bring a wrongful death case, and settled their tort actions without Bethlehem's prior approval.

On February 25, 1985, John Cretan died. Renate and Nicole Cretan filed LHWCA death benefit and survivors' compensation claims on April 8, 1985. Bethlehem contested their claims and paid no benefits.

At the administrative hearing Bethlehem urged LHWCA § 33(g)[1] as a bar to petitioners' death benefits because it had not approved the tort settlement whereby Renate gave up her future right to file a wrongful death action as a condition of settling the product liability case she and her husband pursued while he was alive. Alternatively, Bethlehem argued that it was entitled to credit the net tort settlement against any LHWCA liability under § 33(f). Petitioners argued that § 33(f) and 33(g) only apply to settlements entered by "persons entitled to" LHWCA benefits; that they were <u>not</u> entitled to survivors or death benefits until <u>after John Cretan died</u>; and that their failure to secure Bethlehem's approval before settling their tort action in 1984 had no forfeiting affect upon the LHWCA death benefit compensation to which they became entitled when John Cretan died the following year.

The Administrative Law Judge (ALJ) found § 33(g) inapplicable because Bethlehem was not paying benefits when the Cretans settled the product liability case, but granted Bethlehem a

---

1. Title 33 U.S.C. § 933(g), hereinafter "33(g)."

§ 33(f) credit for portions of the tort recovery. Bethlehem appealed the § 33(g) ruling and petitioners appealed the § 33(f) ruling to the Benefits Review Board ("Board"). The Board affirmed the ALJ's decision.

Petitioners and Bethlehem appealed to the United States Court of Appeals for the Ninth Circuit, which had jurisdiction under 33 U.S.C. § 21(c). On July 28, 1993, the Ninth Circuit reversed the Board and held petitioners to have been "persons entitled to compensation" under §§ 33(f) and (g) despite this Court's *Cowart v. Nicklos Drilling Co.*, ___ U.S. ___, 112 S.Ct. 2589, 120 L.Ed.2d 379 (1992) pronouncement that a person only becomes "entitled to" LHWCA compensation when the "right to recovery vests." (*Id.* 112 S.Ct. 2595.) Thus, the Ninth Circuit held that the Cretans' failure to obtain prior written employer approval of the *inter vivos* tort settlement terminated not only Mr. Cretan's right to disability and medical benefits, but also the death benefit claims that the LHWCA's plain language did not permit petitioners to file until after John died.

II. ARGUMENT

This Court noted the harsh effects of § 33(g) in *Cowart v. Nicklos Drilling Co.*, ___ U.S. ___, 112 S.Ct. 2589, 120 L.Ed.2d 379 (1992) which held the subdivision to bar LHWCA benefits where an injured worker's employer pays no benefits, and the worker fails to secure the employer's approval before settling a tort action. (*Id.* at 120 L.Ed.2d 394.) The Ninth Circuit's *Cretan* decision egregiously magnifies those harsh effects by expanding § 33(g) far beyond what Congress wrote. LHWCA § 13(a) provides for widows, widowers and other specified dependents to file death benefit claims within a year *after a covered spouses' death*. *Cretan* bars them from recovering death benefits if they settled a tort action before the spouse died, without employer approval, by deeming them "persons entitled to compensation" before the spouse's death.

Petitioners implore this Court to grant review because the Ninth Circuit's departure from the accepted and usual course of judicial proceedings cries for this Court' supervision, because the Ninth Circuit decided an important question of federal law which has not been but should be settled by this Court, and because the Ninth Circuit decided a federal question in a way that conflicts with this Court's *Cowart* decision.

A. REVIEW IS URGENTLY NECESSARY BECAUSE THE NINTH CIRCUIT'S *CRETAN* DECISION DEFIES THE PLAIN MEANING OF THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT AND THIS COURT'S COWART V. NICKLOS DRILLING CO. OPINION

This Court underscored the first rule of statutory construction in *Cowart*:

> "In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished."

Id. at 112 S.Ct. 2594.[2] Section 33 includes precisely such clarity when read as the integrated statutory scheme Congress intended rather than as isolated subdivisions. Sections 33(f) and (g) turn on the language "person entitled to benefits." In *Cowart*, this Court explained the phase's plain meaning.

> "Both in legal and general usage, the normal meaning of *entitlement* includes a right or benefit for which a person qualifies, and it does not depend upon whether the right has been acknowledged or adjudicated. It means only that *the person satisfies the prerequisites attached to the right.* (Citations omitted.) Cowart ... became a person entitled to compensation *at the moment his right to recovery vested*, not when his employer admitted liability, an event yet to happen."

Id at 112 S.Ct. 2595; emphasis added.

---

2. See, also, *K-Mart Corp. v. Carrier, Inc.*, 486 U.S. 281, 291 (1988) wherein the Supreme Court held that "where the statute is clear and ambiguous 'that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress'.... The traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress."

The Benefits Review Board ("Board") and the Office of Workers' Compensation Programs ("OWCP) Director both interpreted "person entitled to benefits" precisely as this Court explained the statute's clear and unambiguous meaning. Nonetheless, the Ninth Circuit refused judicial deference to the Board's and the Director's imminently reasonable statutory interpretation. As the Ninth Circuit acknowledged in *McDonald v. Director, OWCP*, 897 F.2d 1510, 1512 (9th Cir. 1990),

> "the Board's decisions are reviewed ... for adherence to the statutory standard governing the review of facts and for errors of law. (Citation omitted.) Because the Board is not a policy making agency, its interpretation of the LHWCA is not entitled to any special deference; *the court must, however, respect the Board's interpretation of the statute where such interpretation is reasonable and reflects the policy underlying the statute. Id.; Long v. Director, OWCP*, 767 F.2d 1578, 1580 (9th Cir. 1985). [¶] By contrast, the court *must accord 'considerable weight' to the construction of the statute urged by the OWCP Director. Director, OWCP v. Palmer Coking Coal Co. ('Manowski')*, 867 F.2d 552, 555 (9th Cir. 1989).[3]

Moreover, the LHWCA is to be liberally construed in favor of injured workers' recovery in furtherance of the Act's "humanitarian purpose" and to avoid "harsh and incongruous results." *Voris v. Eikel*, 346 U.S. 328, 333 (1953); *accord, Director, OWCP v. Perini North River Assocs.*, 459 U.S. 297, 315-316 (1983).

The Ninth Circuit's interpretation of the "persons entitled to benefits" language as encompassing not only person's *presently* entitled to benefits by virtue having a vested right to recover LHWCA benefits, but also persons *who may someday qualify* for LHWCA benefits, imposes the egregiously harsh result of terminating petitioners' death benefits before they become entitled to claim them. Indeed, the Ninth Circuit's interpretation of

---

3. Indeed, in *Force v. Director, OWCP*, 938 F.2d 981 (9th Cir. 1991) the Ninth Circuit wrote, "[b]ecause the statute is *easily susceptible* to the Director's interpretation, we need go no further." *Id.* at 938 F.2d 984.

§ 33(g) not only permits, but encourages, employers to contest LHWCA claims and withhold their consent from desperate claimants' settlement of third party tort actions that might otherwise sustain the claimant and his family while he pursues LHWCA remedies. The balance in Congress' carefully integrated statutory scheme that is designed to protect injured workers' recovery without unfairly prejudicing employers' rights to subrogation, is so egregiously tipped in the employer's favor that it is impossible to imagine a fact pattern under which the employer could not avoid liability by withholding benefits and settlement consent until the employee victim is forced to compromise a third party action to survive.

That result defies the LHWCA's humanitarian purpose, the statute's plain language and carefully integrated statutory scheme, the Board's and Director's imminently reasonable interpretation of § 33(g) and the reading of "person entitled to benefits" this Court enunciated in *Cowart*.

B. REVIEW IS URGENTLY NECESSARY BECAUSE THE NINTH CIRCUIT ERRONEOUSLY INTERPRETED LHWCA § 33(g) TO WAIVE STATUTORY RIGHTS BEFORE THEY VEST

LHWCA § 33(g) addresses third party settlements entered by "persons entitled to benefits." This Court explained in *Cowart* that *entitlement* "includes a right or benefit for which a person qualifies," that it "does not depend upon whether the right has been acknowledged or adjudicated," but depends *only* upon whether "*the person satisfies the prerequisites attached to the right.*" "[A] person [is] entitled to compensation *at the moment his right to recovery vest[s].*" *Cowart*, *supra* at 112 S.Ct. 2595.

A right is "vested" when there is an ascertained person with a present right to present or future enjoyment [*Pearsall v. Great N.R. Co.*, 161 U.S. 646, 656-8 (1896)], that "has been so far perfected that it cannot be taken away by statute" [Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation* (1960) 73 Harv.L.Rev. 692, 696, 698], that it is proper for the state to recognize and protect, and of which the individual may not be deprived arbitrarily without injustice. *Campbell v. Holt*, 115 U.S. 620 (1885).

The Fourth Circuit's *Branham v. Terminal Shipping Co.*, 136 F.2d 655 (4th Cir. 1943) opinion attests to the propriety of determining whether a covered worker leaves heirs entitled to death benefits, at the time of the worker's death. (*Id.* at 659.) The Ninth Circuit's *Todd Shipyards Corp. v. Witthahn*, 569 F.2d 899 (9th Cir. 1979) opinion, similarly, holds that injured workers' deaths gives "rise to *new claims for relief not in existence* during their lifetimes. When they died, ... their survivors' rights to death benefits *first vested* ...." *Id.* at 596 F.2d 902.

The LHWCA systematically ties death benefit entitlement to the covered worker's death. Section 2(16) determines dependents' entitlement "at the time of ... death." Section 13(a) delineates the statute of limitations from the time of death or awareness of the relationship of employment and death. Section 19(a) permits dependents to file death benefit claims "at any time after death."

Accordingly, until petitioners' entitlement to LHWCA benefits vested upon John Cretan's death, they manifestly were not "persons entitled to benefits" under Congress' plain language or under this Court's *Cowart* analysis. Renate's LHWCA death benefits vested upon the confluence of her husband's death from the industrial injury and her status as his lawful wife. [33 U.S.C. §§ 2(16) and 9.) Nicole's death benefit claim would not have vested unless her father died and she met 33 U.S.C. § 2(14) and 2(18) standards. Neither entered any settlement while so "entitled" to LHWCA benefits. The Ninth Circuit's decision effectively extinguished their death benefits in 1984, while the employer contested John Cretan's disability benefits and when John and Renate Cretan compromised their tort action in order to survive, but *before* either Renate's or Nicole's "entitlement" to LHWCA benefits vested. This Court's review is urgently necessary to preserve the LHWCA death benefits that Congress created to protect covered workers' dependents.

C. REVIEW IS URGENTLY NECESSARY BECAUSE THE NINTH CIRCUIT'S DECISION EGREGIOUSLY UNDERMINES CONGRESS' CAREFULLY BALANCED, § 33, STATUTORY SCHEME AND FEDERAL POLICY

Congress sought to encourage employers to compensate injured workers by requiring them to secure the workers' compensation or face fines and criminal penalties [§§ 4(a) and 38(a)]. That legislative intent is further evident in the provision making LHWCA compensation the workers' exclusive remedy against employers who comply with the LHWCA's requirement to secure compensation, but permitting suits against those who do not, and foreclosing many potential defenses [§ 5(a)].

The statutory scheme is perhaps most evident in LHWCA § 33. In its entirety, § 33 is an inextricably intertwined, remedial scheme to protect injured workers' rights to compensation and, on balance, to protect complying employers' rights to subrogation from third party tortfeasors. When read as an integrated whole, the statute outlines Congress' purpose. Subdivision 33(a) explains that an injured worker *need not elect* between LHWCA benefits and civil damages against a third party tortfeasor, but may seek both. Thus Congress encouraged third parties to provide a safe work place by permitting injured workers to bring tort actions.

Subdivision 33(b) assigns the injured worker's right to sue the third party tortfeasor, to the employer, unless the injured worker (or survivor) sues the third party within six months of "acceptance of compensation under an award in a compensation order filed by the deputy commissioner, an administrative law judge, or the Board." Congress' automatic assignment of the worker's right to sue a responsible third party, to the employer who paid the compensation the injured worker accepted, is plainly designed to insure that the injured worker does not deprive the employer of his right to subrogation from the wrongdoer by failing to pursue a tort action. It gives the employer 90 days to initiate an action against the third party before the right to sue reverts back to the worker (or survivor).

Congress' logical outline continues as § 33(c) provides that an employer's payment into the Special Fund for the death of a worker who left no survivor to claim LHWCA benefits on his

behalf, constitutes an assignment to the employer of the right a survivor would otherwise have to proceed against a third party.

Next, § 33(d) expressly provides that *the employer may sue or settle with the third party* after an automatic § 33(b) assignment of the injured worker's right to sue.

Section 33(e) divides the proceeds of an employer's successful exercise of the § 33(b), automatic assignment of the right to sue the third party, and includes a share for the injured worker if there is money left over after the employer and Board get their respective shares.

Section 33(f) relates back to the § 33(b) provision that assigns the tort action to the employer *if the injured worker accepts LHWCA compensation* and fails to sue within 90 days, then returns the right to sue to the worker if the employer does not exercise his right to sue within 90 days. Thus, § 33(f) describes the process where a "*person entitled to benefits*," who has accepted compensation, initiates proceedings against the third party. The employer remains liable for the difference between the worker's benefit entitlement and the tort recovery, after reasonable attorneys' fees for the party who brought the tort case.

Section 33(g) provides further detail on the § 33(f) situation — where the injured worker, rather than the employer, brought a tort action. That detail protects the employer from the possibility that an injured worker who is accepting LHWCA benefits from the employer, might "sell out" the employer's subrogation rights by settling for an amount insufficient to repay benefits the employer already provided.

Section 33(h) carries Congress' outline a practical step further. An insured employer's insurer stands in the employer's shoes with respect to subrogation rights and the automatic assignment of the right to sue the third party.

Section 33(i) completes Congress' outline with it's provision that there is no right to elect a tort action against the third party who caused the worker's injury if that third party is an officer or employee of the injured worker's employer.

The Ninth Circuit's *Cretan* decision reaches so far to avoid an injured worker's "double recovery," that, in the process, it eviscerates Congress' carefully integrated, statutory scheme. Recouping lost wages and medical benefits under the LHWCA and pain and suffering, loss of consortium and punitive damages

from a third party tortfeasor in furtherance of the Act's purpose of encouraging third parties to provide longshoremen with a safe work place, provides no double recovery when the employer who pays LHWCA benefits recovers those payments from the tortfeasor's liability. Where, as here, the employer paid nothing, questions of double recovery do not arise. The Cretans and similarly situated claimants laboring under the Ninth Circuit's *Cretan* opinion will be hard pressed to recover *once* in the face of the judicially imposed disincentive to employers' voluntary LHWCA benefit payments and good faith assessment of proposed third party settlements.

The Ninth Circuit's discussion of "double recovery" at 1 F.3d 846 ignores an obvious and equitable middle-ground that comports with the LHWCA's humanitarian purpose without prejudice to an employer's subrogation rights. The Court need not controvert the *Cowart* Court's reading of "entitlement to benefits" as synonymous with "vested right" in order to protect the employer's right to credit any actual wrongful death recovery against eventual LHWCA death benefit liability. Reading § 33(g) literally to address the situation where "a person *entitled* to benefits ... *enters into a settlement* ... of an amount less than ... [she] would be entitled under [the] Act" does not preclude crediting a settlement entered by a person who eventually *becomes* entitled to benefits, against the eventual death benefit liability. Rather, such a literal reading of the Act's plain language merely precludes the harsh and incongruous result the Court's opinion achieves by extinguishing future rights before they accrue.

Legitimate subrogation rights are amply protected by crediting any portion of an *inter vivos* compromise and release of a future wrongful death action against eventual death benefits. Nor is the employee victim motivated to forego a civil wrongful death action so cheaply that the employer's subrogation rights are likely to suffer because the claimant has a direct pecuniary interest in maximizing recovery. *Cretan* includes *no protection* of future death benefit claimants' LHWCA rights, but offers employers a systematic and certain means of avoiding liability altogether. The employer is free to contest LHWCA benefits and withhold settlement consent until the employee victim is forced to settle the third party action without employer approval. Nothing compels the employer to consent to settlement or to *consider* a

proposed settlement in good faith. *Gibson v. ITO Corporation of Ameriport*, 18 BRBS 162 (1986).

Third party defendants routinely demand a compromise and release of potential wrongful death claims as a condition precedent to settling personal injury actions. The claimant, therefore, must resolve present and future civil cases or recover nothing, and has no means to insure collection of LHWCA benefits to sustain hearth and home while negotiations progress. The employer certainly faces no pecuniary inducement to pay *inter vivos* LHWCA benefits that serve the Act's humanitarian goal of sustaining the injured worker's family. Rather, starving the employee into accepting an unapproved settlement assures the employer freedom from future LHWCA liability under *Cretan*.

Indeed, Congress' statutory scheme does not *require* an injured worker to pursue a third party claim and a worker's voluntary dismissal of a tort action, without employer consent, is no bar to LHWCA benefits. *Mills v. Marine Repair Service*, 22 BRBS 335, 339 (1989). The employee's interest in full compensation, however, motivates injured workers to zealously pursue third party actions and maximize recovery. It is only where any employer resists benefit payments and withholds settlement consent that a claimant's motivation to vigorously pursue a third party claim may succumb to questions of sheer economic survival. And, the greater the employer's pecuniary interest in withholding benefits and settlement consent as a means of forcing the extinction of future LHWCA liability, the more likely the employee victim third party compromise for less than LHWCA benefits would theoretically provide. The *Cretan* opinion creates the bitter irony of a classic "catch 22" for the injured employee while giving the employer systematic certainty to avoid liability. Congress intended otherwise when it carefully crafted an integrated statutory scheme with the humanitarian purpose of protecting injured workers while inducing third party tortfeasors to provide a safe work place and while protecting employers whose LHWCA liability arises without fault — with subrogation rights if they provide compensation. *Cretan* upsets that delicate balance and unconscionably relegates covered industrial injury victims to precisely the economic desperation that Congress sought to eliminate through the LHWCA's humanitarian provisions.

III. CONCLUSION

For the foregoing reasons petitioners respectfully implore this honorable court to grant review, to vacate the decision below, and to recognize and implement the LHWCA's plain language, humanitarian purpose and carefully balanced statutory scheme for protecting injured workers' rights without sacrificing employers' subrogation entitlement.

DATED: February 16, 1994

Respectfully submitted,
KAZAN, McCLAIN, EDISES & SIMON
A Professional Corporation
171 Twelfth Street
Oakland, California 94607
(510) 465-7728

By _____
VICTORIA EDISES
Counsel of Record for Petitioners

By _____
DIANNA LYONS

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
(OCTOBER 1993 TERM)

RENATE CRETAN (Widow of JOHN CRETAN), et al.,

Petitioners,

vs.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, and BETHLEHEM STEEL CORPORATION,

Respondents.

APPENDIX OF EXHIBITS IN SUPPORT OF PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Victoria Edises, Esq., Counsel of Record
Dianna Lyons, Esq.
KAZAN, McCLAIN, EDISES & SIMON
A Professional Law Corporation
171 Twelfth Street, Third Floor
Oakland, California 94607
Telephone: (510) 465-7728

Attorneys for Petitioners
RENATE and NICOLE CRETAN

Exhibits:

Cretan v. Bethlehem Steel Corp. (Slip Opinion)

Cretan v. Bethlehem Steel Corp., 1 F.3d 843 (9th Cir. 1993)

Cretan: Order Denying Reconsideration

Cretan: Benefits Review Board Slip Opinion

Cretan: Administrative Law Judge's Decision

Order

Supplemental Order

RECEIVED JUL 29 1993

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RENATE CRETAN, Widow of John Cretan; NICOLE CRETAN, Daughter of John Cretan,
Petitioners-Cross-Respondents,

v.

BETHLEHEM STEEL CORPORATION,
Respondent-Cross-Petitioner,

and

DIRECTOR, OFFICE OF WORKERS COMPENSATION PROGRAMS,
Respondent.

Nos. 90-70589/90-70634

OWCP No. 13-75715

BRB No. 87-909, 87-909A

OPINION

Petition for Review of an Order of the Benefits Review Board

Argued and Submitted
May 14, 1993—San Francisco, California

Filed July 28, 1993

Before: James R. Browning, Herbert Y. C. Choy, and William C. Canby, Jr., Circuit Judges

Opinion by Judge Canby

SUMMARY

Labor and Employment/Workers Compensation

The court of appeals affirmed in part and reversed in part an order of the Benefits Review Board and remanded. The

court held that survivors who settled third-party tort claims prior to the death of their decedent were subject to the offset provisions of the Longshore and Harbor Workers' Compensation Act (LHWCA) as "persons entitled to compensation" when claiming disability compensation and death benefits.

Decedent John Cretan filed a claim for compensation under the LHWCA in connection with his work-related terminal asbestos illness incurred while employed in ship construction for respondent Bethlehem Steel Corporation. John also brought a third-party action against several asbestos manufacturers. At the same time that John settled his damages action, and without seeking the approval of Bethlehem, his wife and daughter, petitioners Renate and Nicole Cretan, settled their potential claims against the manufacturers for John's wrongful death.

After John's death, the Cretans claimed survivors' disability compensation and death benefits under the LHWCA. On appeal after trial by an ALJ, the Board held (1) that Section 33(g), 33 U.S.C. Section 933(g), did not bar the Cretans' claims and (2) that Section 33(f) entitled Bethlehem to an offset equal to the family's aggregate net tort recovery. Both parties appealed.

[1] Section 33(f) provides that an employer is entitled to an offset equal to the amount of any third-party recovery made by a person entitled to compensation. [2] Section 33(g) provides that if a person entitled to compensation settles a third-party claim for less than the benefits payable under the LHWCA, the employer is obligated to pay benefits only if it gave its prior written approval of the settlement. [3] The Cretans contended that they were not "persons entitled to compensation" at the time of their third-party settlements because John had not yet died.

[4] The Cretans' contention as it pertained to Section 33(f) was rejected by *Force v. Director, Office of Workers' Com-*

pensation Programs, 938 F.2d 981 (9th Cir. 1991), which held that an entitlement to compensation that arose after a settlement nonetheless allowed the employer to take its offset. [5] The dicta in *Estate of Cowart v. Nicklos Drilling Co.*, 112 S.Ct. 2589 (1992), which the Cretans asserted implicitly overruled *Force*, were not controlling. The facts which the dicta addressed were so different from *Force* that there was no reason to assume that the Supreme Court had the Cretans' situation in mind when it spoke.

[6] However, *Cowart* was controlling on the necessity that the phrase "person entitled to compensation" must have the same meaning throughout the LHWCA. Thus, the Cretans were also such persons within the meaning of Section 33(g).

COUNSEL

Victoria Edises, Kazan, McClain, Edises & Simon, Oakland, California, for the petitioners-cross-respondents.

Joshua T. Gillelan, United States Department of Labor, Office of the Solicitor, Washington, D.C. for the Respondent; Bill Parrish, San Francisco, California, Robert E. Babcock, Littler, Mendelson, Fastiff & Tichy, Portland, Oregon, for the respondent-cross-petitioner.

OPINION

CANBY, Circuit Judge

We have before us a survivors' petition and an employer's cross-petition for review of a Benefits Review Board decision and order that resolved the survivors' claim for disability compensation and death benefits under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C.

§§ 901-950. We have jurisdiction under 33 U.S.C. § 921(c). We affirm in part and reverse in part.

BACKGROUND

In 1942 and 1943, Bethlehem Steel Corporation (Bethlehem) employed John Cretan as an electrician engaged in the repair and construction of ships. John was exposed to asbestos on the job. Bethlehem was John's only maritime employer.

In January 1984, John learned he suffered from mesothelioma, a terminal asbestos-related disease. He died in February 1985. Before he died, John filed a timely claim for compensation and medical benefits under the Act. Bethlehem disputed liability. Two months after John's death his wife Renate and daughter Nicole claimed disability compensation as his survivors and death benefits in their own right. Bethlehem disputed those claims too.

Prior to his death, John had also brought a product liability action against a number of asbestos manufacturers. He settled his third-party claims in a series of agreements. Although neither Renate nor Nicole were parties to John's action, each settled her potential claims for his wrongful death against the manufacturers at that time. Renate also settled, in the same series of agreements, an action which she had filed seeking recovery for loss of consortium. The net proceeds from the settlements were approximately $333,489. One asbestos manufacturer also bought a $50,000 annuity on behalf of the family.

An administrative law judge (ALJ) tried the Cretans' LHWCA claims after John's death. The ALJ awarded disability compensation and medical benefits to Renate as John's widow. Renate and Nicole also received death benefit awards. The ALJ rejected Bethlehem's argument that section 33(g) of the Act, 33 U.S.C. § 933(g), had terminated Bethlehem's liability to the Cretans because the family had failed to secure

Bethlehem's written approval of the third-party settlements. The ALJ, however, permitted Bethlehem to offset a portion of the settlements against its statutory liability. Renate and Nicole had argued without success that the offset provision contained in section 33(f) of the Act, 33 U.S.C. § 933(f), was inapplicable to them.

The Cretans and Bethlehem each appealed to the Board. In addition to resolving other objections to the ALJ's ruling, the Board agreed that section 33(g) was no bar to the LHWCA claims. The Board also agreed that Bethlehem was entitled to credit under section 33(f). The Board concluded, however, that Bethlehem was entitled to a credit in the amount of the family's aggregate net tort recovery. We review the Board's decision for "errors of law and adherence to the substantial evidence standard," *Port of Portland v. Director, Office of Workers' Compensation Programs*, 932 F.2d 836, 838 (9th Cir. 1991), and we may affirm on any basis contained in the record. *National Steel & Shipbuilding Co. v. United States Dep't of Labor, Office of Workers' Compensation Programs*, 606 F.2d 875, 883 n.4 (9th Cir. 1979).

DISCUSSION

The Cretans and Bethlehem each raise several challenges to the Board's ruling. The dispositive questions, however, are whether Renate and Nicole were subject to sections 33(f) and (g). We conclude that they were, and that they consequently cannot recover under the LHWCA.

[1] Section 33 of the LHWCA establishes a claimant's right to seek recovery from third parties without fear of being categorically denied compensation or benefits under the Act. This right, however, is qualified by subsections (f) and (g), which complement each other in important respects. Section 33(f) provides:

> If the *person entitled to compensation* institutes proceedings . . . the employer shall be required to pay as

> compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered against [a] third person.

33 U.S.C. § 933(f) (1988) (emphasis added). The import of this provision as a guard against double recovery is clear enough: the employer is entitled to set off against its liability any recovery that the person entitled to compensation received from third parties.

[2] Subsection (g) provides in relevant part:

> If the *person entitled to compensation* . . . enters into a settlement with a third person . . . for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation . . . only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed . . . .

43 U.S.C. § 933(g)(1). The purpose of this provision is to protect the employer against the employee's entering an inordinately low settlement, which would deprive the employer of a proper set-off under section 33(f).

As a result of the interplay of sections 33(f) and 33(g), the Cretans will necessarily be precluded from any compensation recovery if they fall within the reach of both subsections.[1] They do not dispute that they failed to obtain the written consent of Bethlehem to the settlement. As a result, if their third-party recovery was less than they are entitled to under LHWCA, section 33(g) precludes any LHWCA recovery from Bethlehem. On the other hand, if their third-party recov-

[1] The Cretans conceded this proposition at oral argument.

ery exceeded their entitlement under LHWCA, Bethlehem would be entitled to a 100% set-off under section 33(f).

[3] The Cretans contend, however, that they do not fall within the scope of either subsection because both expressly apply only to persons "entitled to compensation." They argue that they were not persons "entitled to compensation" when they settled their tort claims because John had not yet died. Our resolution of this issue is complicated by the fact that in the past the Director has given the term "person entitled to compensation" different meanings in sections 33(f) and 33(g), and each meaning has changed over time.

[4] With regard to section 33(f), the Cretans urge that the fact that they were not "entitled to compensation" at the time of the recovery precludes Bethlehem from taking any set-off. The ALJ and the Board each rejected that argument, and later we adopted the Board's position in another appeal. *See Force v. Director, Office of Workers' Compensation Programs*, 938 F.2d 981, 984-985 (9th Cir. 1991). In *Force*, we deferred to the Director's view at that time that a claimant's status as a "person entitled to compensation" need not be fixed at any particular moment. Even though the entitlement to compensation arose after the settlement, it did eventually arise and the employer was entitled to its set-off. *Id.*

The Cretans argue, however, that *Force* is implicitly overruled by the Supreme Court's recent decision in *Estate of Cowart v. Nicklos Drilling Co.*, 112 S.Ct. 2589 (1992). We disagree.

Cowart arose under section 33(g). There the claimant had been informed that he was entitled to benefits under the LHWCA, but no order had been entered and no payments had been made by the employer. *Id.* at 2592. At that point, the claimant entered into a settlement, lower than his potential LHWCA benefits, with a third party. *See id.* He did not obtain the prior written consent of his employer. *Id.* Before *Cowart*

reached the Supreme Court, it had been the Director's position that a claimant who had not yet received a compensation order and had received no payments was not a "person entitled to compensation" for purposes of section 33(g). *Id.* at 2593-94. The Director reversed his position in the Supreme Court, *id.* at 2594, and the Court adopted the new position. The Court held that the term "person entitled to compensation" in section 33(g) was not limited to persons who had either obtained a compensation order or had received benefits. "Both in legal and general usage, the normal meaning of entitlement includes a right or benefit for which a person qualifies, and it does not depend upon whether the right has been acknowledged or adjudicated." *Id.* at 2595. Accordingly, section 33(g) applied and the claimant was barred from recovering LHWCA benefits from his employer.

[5] It is clear that the holding of *Cowart* does not dictate the outcome of our case. It does not rule on the question whether a claimant whose entitlement will mature upon a death that has not yet occurred is a "person entitled to compensation." *Cowart* does, however, contain language that in isolation appears to support the Cretans. In rejecting the view that Cowart did not become "entitled" until he obtained an order or a payment, the Court stated: "He became a person entitled to compensation at the moment his right to recovery vested, not when his employer admitted liability, an event even yet to happen." *Id.* at 2595. The Court also stated that the normal meaning of entitlement is that "the person satisfies the prerequisites attached to the right." *Id.* The Cretans seize upon this language, and argue that their entitlement to compensation under the Act vested when John died. There is no reason, however, to assume that the Supreme Court had the present situation in mind when it uttered these dicta. The Court's point was that an entitlement did not have to be reduced to order or payment to be an entitlement. The Cretans give the vesting language a reading which is separated from the facts to which it is addressed. We decline to give the Supreme Court's statement a binding effect that there is no reason to

BEST AVA

believe the Court intended. *See United States v. Ordonez*, 737 F.2d 793, 803 n.1 (9th Cir. 1984) (discussing uses of dictum).

The Supreme Court's interpretation of section 33(g) in *Cowart* served the purposes of that subsection to " 'protect[ ] the employer against his employee's accepting too little for his cause of action against a third party.' " *Cowart*, 112 S. Ct. at 2598 (quoting *Banks v. Chicago Grain Trimmers*, 390 U.S. 459, 467 (1968)). The construction urged by the Cretans, if applied to section 33(g), would defeat that purpose. If applied to section 33(f), the same construction would defeat the purpose of that subsection to protect the employer against double recovery. In light of the purposes of section 33(f), there is little sense in a distinction that turns on whether the death for which settlement is made has yet to occur. That consideration leads us to adhere to our ruling in *Force* that claimants who settle before the death that gives rise to LHWCA benefits are subject to the section 33(f) set-off; the entitlement does not have to have become vested at the time the settlement is made. " 'The only relevant question is whether the claimant is impermissibly recovering twice for the same injury, regardless of when such payments occur.' " *Force*, 938 F.2d at 984 (quoting Director's brief).

It is true that in *Force*, we deferred to the Director's interpretation of section 33(f), and that the Director now has changed positions and urges the same result as do the Cretans. For reasons already largely stated, we find the Director's new interpretation unreasonable. *See Mesa Verde Constr. Co. v. Northern Cal. Dist. Council of Laborers*, 861 F.2d 1124, 1136 (9th Cir. 1988) (en banc) (substituting revised agency interpretation for an adverse precedent unnecessary if the substitution is unreasonable or inconsistent with the statute). If we were to adopt the Director's new view, relatives of claimants who are certain to die could negotiate settlements before the claimant's death and defeat the employer's offset. Furthermore, if the new view is extended to section 33(g), third-party tortfeasors could benefit from offering to desperate families

LABLE COPY

inordinately small settlements the deficiencies of which the employer would have to make up. Those results would contradict the policy of employer protection that is evident on the face of sections 33(f) and (g). *See Cowart*, 112 S.Ct. at 2598.

[6] On one point, we do agree with the Cretans and the Director regarding the effect of *Cowart*. The term "person entitled to compensation" must receive the same construction in sections 33(f) and 33(g), in accord with "the basic canon of statutory construction that identical terms within an Act bear the same meaning." *Cowart*, 112 S. Ct. at 2596. Indeed, one of the reasons that the Supreme Court rejected the narrow interpretation of "entitled" urged by Cowart was that it made no sense when applied equally to section 33(f). *Id.* Thus, in accordance with our ruling regarding section 33(f), we hold that the Cretans are persons "entitled to compensation" within the meaning of section 33(g). As we earlier explained, this holding, when combined with our ruling on section 33(f), defeats recovery for the Cretans under LHWCA: if their tort settlement was less than their statutory entitlement, they are barred by section 33(g); if the recovery exceeded their statutory entitlement, Bethlehem is entitled to set off its entire statutory liability under section 33(f).

CONCLUSION

Because Renate and Nicole Cretan were persons "entitled to compensation," they were subject to the provisions of sections 33(f) and (g) of the LHWCA when they settled their tort claims with third parties. Together, the two provisions act as a complete bar to recovery from Bethlehem. Accordingly, we need not consider the petitioners' and cross-petitioner's other arguments.

That portion of the Board's decision that allows Bethlehem a total set-off of its liabilities pursuant to section 33(f) is affirmed. That part of the Board's decision holding the Cre-

tans not to be subject to section 33(g) is reversed. The matter is remanded to the Board.

AFFIRMED IN PART; REVERSED IN PART; REMANDED. Costs in favor of Bethlehem.

**Renate CRETAN, Widow of John Cretan;
Nicole Cretan, Daughter of John Cretan,
Petitioners-Cross-Respondents,**

v.

**BETHLEHEM STEEL CORPORATION,
Respondent-Cross-Petitioner,**

and

**Director, Office of Workers
Compensation Programs,
Respondent.
Nos. 90-70589, 90-70634.**

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted May 14, 1993.
Decided July 28, 1993.

Claimant's wife and daughter and claimant's employer sought review of Benefits Review Board's decision resolving wife's and daughter's claims for benefits under Longshore and Harbor Workers' Compensation Act (LHWCA). The Court of Appeals, Canby, Circuit Judge, held that: (1) wife and daughter who settled their tort claims against asbestos manufacturers before claimant was dead were persons "entitled to compensation" within meaning of LHWCA sections permitting employer to set off against its liability any recovery that person entitled to compensation received from third parties and protecting employer

against inordinately low settlements, and (2) LHWCA sections acted as complete bar to recovery.

Affirmed in part; reversed in part and remanded.

1. **Workers' Compensation ⚷ 1001**

Court of Appeals reviews Benefits Review Board's decision for errors of law and adherence to substantial evidence standard and Court may affirm on any basis contained in the record.

2. **Workers' Compensation ⚷ 907, 937**

Claimant's wife and daughter who settled their tort claims against asbestos manufacturers before claimant's death were "persons entitled to compensation" within meaning of LHWCA sections permitting employer to set off against its liability any recovery that "person entitled to compensation" received from third parties and protecting employer against inordinately low settlements and together these sections acted as complete bar to recovery by wife and daughter; wife and daughter failed to obtain written consent of employer to third-party settlements and, as a result, if their tort settlements were less than their statutory entitlement, they were barred by LHWCA section protecting employer against inordinately low settlements and if recovery exceeded their statutory entitlement, employer was entitled to set off its entire statutory liability. Longshore and Harbor Workers' Compensation Act, § 33(f, g), as amended, 33 U.S.C.A. § 933(f, g).

See publication Words and Phrases for other judicial constructions and definitions.

3. **Workers' Compensation** ⚷ **907, 937**

Claimants who settle before death that gives rise to Longshore and Harbor Workers' Compensation Act (LHWCA) benefits are subject to LHWCA section providing that employer is entitled to set off against its liability any recovery that claimant received from third parties; claimant's entitlement does not have to be vested at time that settlement is made. Longshore and Harbor Workers' Compensation Act, § 33(f), as amended, 33 U.S.C.A. § 933(f).

4. **Workers' Compensation** ⚷ **907, 937**

Court of Appeals would not defer to Director of Office of Workers' Compensation Programs' new interpretation, that claimant's survivors who settle tort claims before claimant's death are not "persons entitled to compensation" for purposes of LHWCA section providing that employer is entitled to set off against its liability any recovery that "person entitled to compensation" received from third parties; Director's new interpretation was unreasonable for if Director's view was adopted, then relatives of claimants who were certain to die could negotiate settlements before claimant's death and defeat employer's offset. Longshore and Harbor Workers' Compensation Act, § 33(f), as amended, 33 U.S.C.A. § 933(f).

5. **Workers' Compensation** ⚷ **907**

Term "person entitled to compensation" most receive same construction in LHWCA section, stating that if "person entitled to compensation" institutes proceedings, employer shall be required to pay as compensation sum equal to excess of amount which is payable on account of injury over net amount recovered against third person, as term receives in LHWCA section, stating if "person entitled to compensation" enters into

settlement with third person for amount less than compensation to which person would be entitled, then employer shall be liable for compensation only if it approved settlement. Longshore and Harbor Workers' Compensation Act, § 33(f, g), as amended, 33 U.S.C.A. § 933(f, g).

Victoria Edises, Kazan, McClain, Edises & Simon, Oakland, CA, for petitioners-cross-respondents.

Joshua T. Gillelan, U.S. Dept. of Labor. Office of the Sol., Washington, DC, for the respondent; Bill Parrish, San Francisco, CA, Robert E. Babcock, Littler, Mendelson, Fastiff & Tichy, Portland, OR, for respondent cross-petitioner.

Petition for Review of an Order of the Benefits Review Board.

Before: BROWNING, CHOY, and CANBY, Circuit Judges.

CANBY, Circuit Judge.

We have before us a survivors' petition and an employer's cross-petition for review of a Benefits Review Board decision and order that resolved the survivors' claim for disability compensation and death benefits under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901-950. We have jurisdiction under 33 U.S.C. § 921(c). We affirm in part and reverse in part.

BACKGROUND

In 1942 and 1943, Bethlehem Steel Corporation (Bethlehem) employed John Cretan as an electrician engaged in the repair and construction of ships. John was exposed to asbestos on the job. Bethlehem was John's only maritime employer.

In January 1984, John learned he suffered from mesothelioma, a terminal asbestos-related disease. He died in February 1985. Before he died, John filed a timely claim for compensation and medical benefits under the Act. Bethlehem disputed liability. Two months after John's death his wife Renate and daughter Nicole claimed disability compensation as his survivors and death benefits in their own right. Bethlehem disputed those claims too.

Prior to his death, John had also brought a product liability action against a number of asbestos manufacturers. He settled his third-party claims in a series of agreements. Although neither Renate nor Nicole were parties to John's action, each settled her potential claims for his wrongful death against the manufacturers at that time. Renate also settled, in the same series of agreements, an action which she had filed seeking recovery for loss of consortium. The net proceeds from the settlements were approximately $333,489. One asbestos manufacturer also bought a $50,000 annuity on behalf of the family.

An administrative law judge (ALJ) tried the Cretans' LHWCA claims after John's death. The ALJ awarded disability compensation and medical benefits to Renate as John's widow. Renate and Nicole also received death benefit awards. The ALJ rejected Bethlehem's argument that section 33(g) of the Act, 33 U.S.C. § 933(g), had terminated Bethlehem's liability to the Cretans because the family had failed to secure Bethlehem's written approval of the third party settlements. The ALJ, however, permitted Bethlehem to offset a portion of the settlements against its statutory liability. Renate and Nicole had argued without success that the offset provision contained in section 33(f) of the Act, 33 U.S.C. § 933(f), was inapplicable to them.

[1] The Cretans and Bethlehem each appealed to the Board. In addition to resolving other objections to the ALJ's ruling, the Board agreed that section 33(g) was no bar to the LHWCA claims. The Board also agreed that Bethlehem was

entitled to credit under section 33(f). The Board concluded, however, that Bethlehem was entitled to a credit in the amount of the family's aggregate net tort recovery. We review the Board's decision for "errors of law and adherence to the substantial evidence standard," *Port of Portland v. Director, Office of Workers' Compensation Programs*, 932 F.2d 836, 838 (9th Cir. 1991), and we may affirm on any basis contained in the record. *National Steel & Shipbuilding Co. v. United States Dep't of Labor, Office of Workers' Compensation Programs*, 606 F.2d 875, 883 n. 4 (9th Cir. 1979).

DISCUSSION

[2] The Cretans and Bethlehem each raise several challenges to the Board's ruling. The dispositive questions, however, are whether Renate and Nicole were subject to sections 33(f) and (g). We conclude that they were, and that they consequently cannot recover under the LHWCA.

Section 33 of the LHWCA establishes a claimant's right to seek recovery from third parties without fear of being categorically denied compensation or benefits under the Act. This right, however, is qualified by subsections (f) and (g), which complement each other in important respects. Section 33(f) provides:

> If the person *entitled to compensation* institutes proceedings ... the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered against [a] third person.

33 U.S.C. § 933(f) (1988) (emphasis added). The import of this provision as a guard against double recovery is clear enough: the employer is entitled to set off against its liability any recovery

that the person entitled to compensation received from third parties.

> Subsection (g) provides in relevant part: If the *person entitled to compensation* ... enters into a settlement with a third person ... for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation ... only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed....

33 U.S.C. § 933(g)(1). The purpose of this provision is to protect the employer against the employee's entering an inordinately low settlement, which would deprive the employer of a proper set-off under section 33(f).

As a result of the interplay of sections 33(f) and 33(g), the Cretans will necessarily be precluded from any compensation recovery if they fall within the reach of both subsections.[1] They do not dispute that they failed to obtain the written consent of Bethlehem to the settlement. As a result, if their third-party recovery was less than they are entitled to under LHWCA, section 33(g) precludes any LHWCA recovery from Bethlehem. On the other hand, if their third-party recovery exceeded their entitlement under LHWCA, Bethlehem would be entitled to a 100% set-off under section 33(f).

The Cretans contend, however, that they do not fall within the scope of either subsection because both expressly apply only to persons "entitled to compensation." They argue that they were not persons "entitled to compensation" when they settled their tort claims because John had not yet died. Our resolution of

---

1. The Cretans conceded this proposition at oral argument.

this issue is complicated by the fact that in the past the Director has given the term "person entitled to compensation" different meanings in sections 33(f) and 33(g), and each meaning has changed over time.

With regard to section 33(f), the Cretans urge that the fact that they were not "entitled to compensation" at the time of the recovery precludes Bethlehem from taking any set-off. The ALJ and the Board each rejected that argument, and later we adopted the Board's position in another appeal. *See Force v. Director, Office of Workers' Compensation Programs*, 938 F.2d 981, 984-985 (9th Cir. 1991). In *Force*, we deferred to the Director's view at that time that a claimant's status as a "person entitled to compensation" need not be fixed at any particular moment. Even though the entitlement to compensation arose after the settlement, it did eventually arise and the employer was entitled to its set-off. *Id.*

The Cretans argue, however, that Force is implicitly overruled by the Supreme Court's recent decision in *Estate of Cowart v. Nicklos Drilling Co.*, — U.S. —, 112 S.Ct. 2589, 120 L.Ed.2d 379 (1992). We disagree.

Cowart arose under section 33(g). There the claimant had been informed that he was entitled to benefits under the LHWCA, but no order had been entered and no payments had been made by the employer. *Id.* at —, 112 S.Ct. at 2592. At that point, the claimant entered into a ettlement, lower than his potential LHWCA benefits, with a third party. *See id.* He did not obtain the prior written consent of his employer. *Id.* Before *Cowart* reached the Supreme Court, it had been the Director's position that a claimant who had not yet received a compensation order and had received no payments was not a "person entitled to compensation" for purposes of section 33(g). *Id.* at —, 112 S.Ct. at 2593-94. The Director reversed his position in the Supreme Court, *id.* at —, 112 S.Ct. at 2594, and the Court adopted the new position. The Court held that the term "person entitled to compensation" in section 33(g) was not limited to persons who

had either obtained a compensation order or had received benefits. "Both in legal and general usage, the normal meaning of entitlement includes a right or benefit for which a person qualifies, and it does not depend upon whether the right has been acknowledged or adjudicated." *Id.* at —, 112 S.Ct. at 2595. Accordingly, section 33(g) applied and the claimant was barred from recovering LHWCA benefits from his employer.

It is clear that the holding of *Cowart* does not dictate the outcome of our case. It does not rule on the question whether a claimant whose entitlement will mature upon a death that has not yet occurred is a "person entitled to compensation." *Cowart* does, however, contain language that in isolation appears to support the Cretans. In rejecting the view that Cowart did not become "entitled" until he obtained an order or a payment, the Court stated: "He became a person entitled to compensation at the moment his right to recovery vested, not when his employer admitted liability, an event even yet to happen." *Id.* at —, 112 S.Ct. at 2595. The Court also stated that the normal meaning of entitlement is that "the person satisfies the prerequisites attached to the right." *Id.* The Cretans seize upon this language, and argue that their entitlement to compensation under the Act vested when John died. There is no reason, however, to assume that the Supreme Court had the present situation in mind when it uttered these dicta. The Court's point was that an entitlement did not have to be reduced to order or payment to be an entitlement. The Cretans give the vesting language a reading which is separated from the facts to which it is addressed. We decline to give the Supreme Court's statement a binding effect that there is no reason to believe the Court intended. See *United States v. Ordonez*, 737 F.2d 793, 803 n. 1 (9th Cir.1984) (discussing uses of dictum).

[3] The Supreme Court's interpretation of section 33(g) in *Cowart* served the purposes of that subsection to "'protect[ ] the employer against his employee's accepting too little for his cause of action against a third party.'" *Cowart*, — U.S. at —, 112 S.Ct. at 2598 (quoting *Banks v. Chicago Grain Trimmers*,

390 U.S. 459, 467, 88 S.Ct. 1140, 1145, 20 L.Ed.2d 30 (1968)). The construction urged by the Cretans, if applied to section 33(g), would defeat that purpose. If applied to section 33(f), the same construction would defeat the purpose of that subsection to protect the employer against double recovery. In light of the purposes of section 33(f), there is little sense in a distinction that turns on whether the death for which settlement is made has yet to occur. That consideration leads us to adhere to our ruling in *Force* that claimants who settle before the death that gives rise to LHWCA benefits are subject to the section 33(f) set-off; the entitlement does not have to have become vested at the time the settlement is made. "'The only relevant question is whether the claimant is impermissibly recovering twice for the same injury, regardless of when such payments occur.'" *Force*, 938 F.2d at 984 (quoting Director's brief).

[4] It is true that in *Force*, we deferred to the Director's interpretation of section 33(f), and that the Director now has changed positions and urges the same result as do the Cretans. For reasons already largely stated, we find the Director's new interpretation unreasonable. See *Mesa Verde Constr. Co. v. Northern Cal. Dist. Council of Laborers*, 861 F.2d 1124, 1136 (9th Cir.1988) (en banc) (substituting revised agency interpretation for an adverse precedent unnecessary if the substitution is unreasonable or inconsistent with the statute). If we were to adopt the Director's new view, relatives of claimants who are certain to die could negotiate settlements before the claimant's death and defeat the employer's offset. Furthermore, if the new view is extended to section 33(g), third-party tortfeasors could benefit from offering to desperate families inordinately small settlements the deficiencies of which the employer would have to make up. Those results would contradict the policy of employer protection that is evident on the face of sections 33(f) and (g). *See Cowart*, — U.S. at —, 112 S.Ct. at 2598.

[5] On one point we do agree with the Cretans and the Director regarding the effect of Cowart. The term "person entitled to compensation" must receive the same construction in

sections 33(f) and 33(g), in accord with "the basic canon of statutory construction that identical terms within an Act bear the same meaning." *Cowart*, — U.S. at —, 112 S.Ct. at 2596. Indeed, one of the reasons that the Supreme Court rejected the narrow interpretation of "entitled" urged by Cowart was that it made no sense when applied equally to section 33(f). *Id.* Thus, in accordance with our ruling regarding section 33(f), we hold that the Cretans are persons "entitled to compensation" within the meaning of section 33(g). As we earlier explained, this holding, when combined with our ruling on section 33(f), defeats recovery for the Cretans under LHWCA: if their tort settlement was less than their statutory entitlement, they are barred by section 33(g); if the recovery exceeded their statutory entitlement, Bethlehem is entitled to set off its entire statutory liability under section 33(f).

CONCLUSION

Because Renate and Nicole Cretan were "persons entitled to compensation," they were subject to the provisions of sections 33(f) and (g) of the LHWCA when they settled their tort claims with third parties. Together, the two provisions act as a complete bar to recovery from Bethlehem. Accordingly, we need not consider the petitioners' and cross-petitioner's other arguments.

That portion of the Board's decision that allows Bethlehem a total set-off of its liabilities pursuant to section 33(f) is affirmed. That part of the Board's decision holding the Cretans not to be subject to section 33(g) is reversed. The matter is remanded to the Board.

AFFIRMED IN PART; REVERSED IN PART; REMANDED. Costs in favor of Bethlehem.

IN THE UNITED STATES COURT OF APPEAL

FOR THE NINTH CIRCUIT

RENATE CRETAN Widow of John Cretan; NICOLE CRETAN, Daughter of John Cretan,	)
Petitioners/Cross-Respondents,	) CA No. 90-70589/90-70634
	) OWCP No. 13-75715
v.	) BRB No. 87-909, 87-909A
BETHLEHEM STEEL CORPORATION,	)
	) ORDER
Respondent/Cross-Petitioner,	)
and	)
DIRECTOR, OFFICE OF WORKERS COMPENSATION PROGRAMS,	)
Respondent.	)

BEFORE: BROWNING, CHOY and CANBY, Circuit Judges

The panel has voted unanimously to deny the petition of respondent Director OWCP for rehearing and suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote to rehear the matter en banc.

The petition for rehearing is hereby denied and the suggestion for rehearing en banc is rejected.

The respondent OWCP's motion for amendment of opinion is denied.

U.S. Department of Labor Benefits Review Board
1111 20th St., N.W.
Washington, D.C. 20036

[LOGO]

BRB Nos. 87-909

and 87-909A

RENATE CRETAN (Widow of JOHN CRETAN	)	
Claimant-Respondent cross-Petitioner	)	
v.	)	
BETHLEHEM STEEL CORPORATION	)	
Self-Insured Employer-Petitioner Cross-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Respondent	)	DECISION and ORDER

Appeals of the Decision and Order, Supplemental Order Amending Decision, Decision and Order on Reconsideration, and Decision and Order on Original Attorney Fee Petition of Robin S. Heyer, Administrative Law Judge, United States Department of Labor.

Victoria Edises (Kazan, McClain, Edises & Simon), Oakland, California, for claimant.

Bill Parrish (Parrish & Associates), San Francisco, California, for self-insured employer.

Joshua T. Gillelan II and Samuel J. Oshinsky (Robert P. Davis, Solicitor of Labor; Carol DeDeo, Associate

Solicitor; Janet Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: STAGE, Chief Administrative Appeals Judge, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order, Supplemental Order Amending Decision, Decision and Order on Reconsideration and Decision and Order on Original Attorney Fee Petition (85-LHC-2116) of Administrative Law Judge Robin S. Heyer awarding benefits on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 et seq. (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. § 921(b) (3); O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965). The Board heard oral argument in this case on July 12, 1990, in San Francisco, California.

Claimant's husband (decedent) was exposed to asbestos during his employment as an electrician for employer during parts of 1942 and 1943. In January 1984, decedent was diagnosed as having mesothelioma. He left his teaching position due to the mesothelioma on January 6, 1984, and the disease caused his death on February 25, 1985. Prior to his death, decedent and claimant instituted law suits against several third party asbestos manufacturers. All but one of the third party defendants agreed to settlements which resulted in a gross amount of $210,000, and a $500 per month annuity payable for at least 40 years. A stipulated judgment of $340,000 was obtained from the remaining third party defendant. The net recovery from the settlements and judgment, after deducting attorney's fees and costs, was $333,488.83, plus the $500 per month annuity payable to claimant or her daughter, Nicole.

Prior to his death, decedent filed a claim for benefits under the Act, seeking compensation and medical benefits. Following decedent's death, claimant pursued decedent's claim and also sought death benefits under the Act for herself and Nicole. 33 U.S.C. § 909.

The administrative law judge found that decedent was permanently totally disabled from January 6, 1984, to the date of death due to mesothelioma arising from asbestos exposure during his employment with employer. 33 U.S.C. § 908(a). Claimant and her daughter were awarded death benefits. 33 U.S.C. § 909. In determining decedent's average weekly wage, the administrative law judge included $6000 paid into a tax sheltered annuity in the year prior to decedent's retirement due to mesothelioma.

The administrative law judge also found that the claims were not barred pursuant to Section 33(g) of the Act, 33 U.S.C. § 933(g)(Supp. V 1987), because in this case claimant was not required to obtain employer's written approval of the settlements, and notice of the settlements and judgment was provided to employer before the instant claims were adjudicated. The administrative law judge found employer entitled to a credit of $383,488.83 from the net proceeds of the third party actions pursuant to Section 33(f) of the Act, 33 U.S.C. § 933(f). Employer received a credit $333,488.33 from the lump sum total of the settlements and stipulated judgment, and the administrative law judge found that the present value of the $500 per month annuity was $50,000, which was added to employer's lump sum credit. Crediting the deposition of claimant's attorney in the third party suits, David McClain, the administrative law judge further apportioned the credit among the awards to decedent, claimant and their daughter. The administrative law judge apportioned the settlement so that, in effect, 77.06 percent of the credit applied to decedent's award and 11.47 percent each applied to the awards to claimant and Nicole. The administrative law judge remanded the case to the deputy commissioner for computation of the precise dollar amounts employer was therefore entitled to offset against each award.

On appeal, employer challenges the administrative law judge's findings that the claims are not barred pursuant to Section

33(g). Employer also contests the apportionment of its credit among the claims, and the administrative law judge's reduction of the $500 per month annuity to its present value. Finally, employer contends that the administrative law judge's average weekly wage determination is erroneous. In a related appeal, employer challenges the administrative law judge's award of attorney's fees to claimant's counsel. Claimant cross-appeals, contesting the amount of the credit awarded to employer pursuant to Section 33(f). The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's finding that Section 33(g) does not bar the claims and the average weekly wage calculation. The Director agrees with employer, however, that the administrative law judge erred by reducing the monthly annuity payment to its present value. He also argues that the administrative law judge erred by finding employer entitled to offset the proceeds from claimant's settlement of her loss of consortium cause of action.

Section 33 (g)

Employer first contends the administrative law judge erred in finding that the instant claims were not barred pursuant to Section 33(g) by claimant's failure to obtain its written approval before entering into the settlements and the stipulated judgment [(g)(1)], and by failing to provide timely notice of the settlements [(g)(2)].[1] The administrative law judge found that:

---

1. The 1984 Amendments to Section 33(g) apply to this claim, since the settlements and judgment were entered into after the September 28, 1984, effective date of the 1984 Amendments and because the claim was adjudicated after the effective date. See generally Blake v. Bethlehem Steel Corp., 21 BRBS 49 (1988); Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub.L. No. 98-426, 98 Stat. 1639, 1655, § 28(a). The amended version of Section 33(g) (1), (2) provides:

> (g)(1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) of this section for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) of this section only if written approval of the settlement is obtained from the employer and the

(continued...)

subsection (g)(1) is not a bar since decedent, claimant, and their daughter were not receiving compensation at the time the settlements and stipulated judgment were executed; and subsection (g)(2) is not a bar because employer had notice of the third party settlements and judgment before its obligation to pay benefits under the Act was triggered by the administrative law judge's Decision and Order.

We reject employer's contentions and affirm the administrative law judge's findings that Section 33(g) does not bar the claims. See Dorsey v. Cooper Stevedoring Co., Inc., 18 BRBS 25 (1986). Section 33(g) (1) requires prior written approval of a settlement by employer only when employer is paying compensation either voluntarily or pursuant to an award at the time of the settlement. Id. In the instant case, employer never paid any compensation prior to the formal hearing. Accordingly, Section 33(g) (1) does not bar the claims. See Picinich v. Lockheed Shipbuilding, 22 BRBS 289 (1989). Section 33(g)(2) requires that claimant give notice to employer of any settlement, regardless of whether it is paying any compensation, prior to an award of benefits. See Bethlehem Steel Corp. v. Mobley, F.2d , No. 88-7141 (9th Cir., Aug. 28, 1990), aff'g 20 BRBS 239 (1988). In the instant case, substantial evidence supports the administrative law judge's finding that employer had

---

1. (...continued)

employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.

(2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this chapter shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter.

33 U.S.C. § 933(g) (1), (2) (Supp. V 1987).

notice of the third party recoveries prior to the formal hearing. Accordingly, Section 33(g) (2) does not bar this claim. Id.

Section 33(f)

Employer next contends that, pursuant to Section 33(f)[2], it is entitled to offset the entire net proceeds of the third party actions against any of its liabilities under the Act, and that the administrative law judge erred in apportioning the credit among the various claims. Employer also contends it is entitled to offset the $500 per month annuity as it is paid to claimant; employer argues that the administrative law judge erred by converting the annuity to its present value and then adding the present value to employer's total lump sum credit. Claimant cross-appeals, contending that employer's credit against its liability for decedent's claim should be limited to that portion of the third party settlements intended to compensate him for his economic loss, excluding that portion intended as compensation for other items such as pain and suffering. Claimant also contends that employer is not entitled to any credit for that portion of the settlements intended to compensate the survivors for the release of their claims because they were not "persons entitled to compensation" at the time the settlements were entered into, and in the alternative, that any credit should be limited to the portion of the third party action proceeds intended to compensate the survivors for wrongful death, and not for claimant's loss of consortium. The Director also argues that employer is not entitled to any credit from the proceeds intended to compensate claimant

---

2. Section 33(f) provides:

> If the person entitled to compensation institutes proceedings within the period prescribed in subsection (b) of this section the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered against such third person. Such net amount shall be equal to the actual amount recovered less the expenses reasonably incurred by such person in respect to such proceedings (including reasonable attorney's fees).

33 U.S.C. § 933(f)(Supp. V 1987).

for her loss of consortium because the cause of action arose prior to the date of decedent's death, and claimant was awarded benefits under the Act for decedent's work-related death.

The parties' apportionment arguments were addressed by the Board in Force v. Kaiser Aluminum and Chemical Corp., 23 BRBS 1 (1989).[3] In Force, the administrative law judge did not apportion the settlement proceeds either among the parties or between the claims of one party for offset purposes on the ground that the agreements themselves did not explicitly allocate specific amounts for the various claims released, and the other evidence of record was insufficient to support apportionment. Force, 23 BRBS at 2-3. The Board affirmed this finding and the administrative law judge's rejection of deposition testimony of the family's attorney, who testified after the fact to the approximate allocation of the settlement proceeds among the potential causes of action for personal injury (wage loss, pain and suffering, loss of life, punitive damages), loss of consortium by the wife, and the wrongful death claims of the wife and sons. Force, 23 BRBS at 3. Employer was therefore entitled to credit its entire liability for both disability and death benefits against the total net settlement amount. Force, 23 BRBS at 3-4. The Board also held that employer was entitled to offset the full amount of decedent's portion of any settlement even if the settlement is for items such as pain and suffering and punitive damages, as well as wage loss. Force, 23 BRBS at 4; see also Brandt v. Stidham Tire Co., 785 F.2d 329, 18 BRBS 73 (CRT)(D.C. Cir. 1986), aff'g on alternate grounds 16 BRBS 277 (1984). The Board rejected claimant's argument that employer was not entitled to any credit against its liability for death benefits since claimant was not a person entitled to compensation" under Section 33(f) at the time the settlements were signed, noting the Board's previous holding that the phrase "person entitled to compensation" has different meanings under Sections 33(f) and 33(g). Force, 23 BRBS at 5; Castorina v. Lykes Bros. Steamship Co., 21 BRBS 305 (1988). Finally, the

---

3. Force is presently on appeal to the United States Court of Appeals for the Ninth Circuit. No. 89-70520. Following oral argument claimant moved that the Board bifurcate this case and withhold a decision on the Section 33(f) issues pending the Ninth Circuit's decision. Employer opposes this motion. We deny claimant's motion, as bifurcation would not serve the interests of judicial economy. See generally Jackson v. Straus Systems, Inc., 21 BRBS 266 (1988).

Board held that while apportionment of the settlement proceeds among the decedent's claim and the survivors' claims may be proper, the Board affirmed the administrative law judge's finding that the testimony of the plaintiff's attorney was insufficient to establish apportionment between the separate claims even if it was uncontradicted. Force, 23 BRBS at 5-6.

For the reasons set forth in Force, we reject claimant's contention that employer's credit against its liability for decedent's claim is limited to only that portion of the third party settlements intended to compensate him for his economic loss. Force, 23 BRBS at 4. We also reject claimant's contention that employer is not entitled to credit that portion of the settlements intended to compensate the survivors because they were not "persons entitled to compensation" at the time the settlements were achieved. Force, 23 BRBS at 5.

Moreover, we reverse the administrative law judge's findings on the facts of this case that employer's credit should be apportioned between the claims of decedent, claimant and their daughter, as we hold that the evidence the administrative law judge relied on to apportion employer's offset among the persons entitled to compensation is legally insufficient to support apportionment. In the instant case, the administrative law judge credited the deposition testimony of the plaintiffs' (decedent and claimant) counsel, David McClain, taken after the conclusion of the third party actions, which was the only apportionment evidence of record. At his deposition, Mr. McClain was asked what percentage of the total third party settlements represented decedent's personal injury action. Mr. McClain replied, "That's hard to say ... we settled all claims jointly and put a lump sum figure on it ... the papers just reflect one sum. Cl. Ex. 28 at 11; see also Cl. Ex 28 at 14. Mr. McClain then gave his estimate as to the "probable" value of each claim released in the third party settlements. Id. at 14-15. Although the administrative law judge noted that Mr. McClain's testimony may be self-serving, he nonetheless stated he found this evidence of apportionment credible, and awarded employer a credit based on Mr. McClain's testimony. However, this after-the-fact evidence is inherently unreliable, as Mr. McClain found it difficult to assess the value of each claim released, noting a lump sum had been agreed upon and that the settlement papers themselves did not contain such a

breakdown. See generally Lustig v. Director, OWCP, 881 F.2d 593, 22 BRBS 159 (CRT)(9th Cir. 1989), aff'g in part and rev'g in part Lustig v. Todd Shipyards Corp., 20 BRBS 207 (1988); Pigott v. General Dynamics Corp., 23 BRBS 30 (1989); Force, 23 BRBS at 4; Briscoe v. American Cynamid Corp., 22 BRBS 389 (1989). Rather, the apportionment must be contained within the settlement agreement itself or in the approval of the settlement. See generally Force, 23 BRBS at 3-4; Brandt v. Stidham Tire Co., 16 BRBS 277, 280 (1984), aff'd in pertinent part on alternate grounds, 785 F.2d 329, 18 BRBS 73 (CRT) (D.C. Cir. 1986). Because we reverse the administrative law judge's reliance on Mr. McClain's testimony, we hold that employer is entitled to credit its entire liability for disability and death benefits against the total net settlement amount. The administrative law judge's decisions are therefore modified to reflect this credit.[4] Force, 23 BRBS at 6. Furthermore, as we reverse the administrative law judge's reliance on Mr. McClain's testimony, we need not address claimant's and the Director's argument regarding apportionment of claimant's recovery for her loss of consortium, as there is no credible evidence as to the worth of this claim. See Force, 23 BRBS at 5.

Employer next challenges the administrative law judge's determination of the total net settlement amount. From the settlements and stipulated judgment decedent and claimant actually received the net amount of $333,488.83 and an annuity of $500 per month commencing in May 1985. Based on the deposition testimony of Mr. McClain, the administrative law judge converted the annuity to a present value of $50,000, and gave employer a credit of $50,000, which he added to the net credit for a total of $383,488.83. Employer contends that the administrative law judge erred by reducing the annuity to present value and that it is entitled to a $500 per month credit as the annuity is actually paid out.

---

4. Claimant argues that Force is not controlling because, unlike Force, in the instant case employer's counsel cross-examined Mr. McClain. Indeed, the administrative law judge noted that employer had the opportunity to rebut Mr. McClain's "apportionment" but did not do so. Nonetheless this evidence is insufficient to support apportionment of the third party recoveries in view of Mr. McClain's statement that all claims were settled jointly for a lump sum.

We agree with employer. In Maples v. Texports Stevedores, 23 BRBS 302 (1990), the Board rejected the argument that the aggregate amount of Longshore benefits payable to claimant but for the Section 33(f) credit should be reduced to present value from the date of the third party recovery to determine when employer's credit is exhausted. The Board determined that aggregate Longshore benefits should not be reduced to present value because: (1) the plain language of the Act does not provide for it; (2) Board practice has been to compute deficiency compensation on a dollar for dollar basis; (3) the New York statute does not allow for it and it is the model for Section 33; and (4) claimant would be undercompensated. Similarly, in Balzer v. General Dynamics Corp., 22 BRBS 447 (1989), recon. denied, 23 BRBS 241 (1990) (Brown, J., dissenting), the Board stated that Section 14(j) of the Act, 33 U.S.C. § 914(j), allows an employer to credit the actual amount of its advance payments compensation under the Act (i.e., dollar for dollar) it voluntarily paid. Balzer, 22 BRBS at 450-451. See also Krotsis v. General Dynamics Corp., 22 BRBS 128 (1989), aff'd sub nom. Director, OWCP v. General Dynamics Corp., 900 F.2d 506, 23 BRBS 40 (CRT) (2d Cir. 1990). Consistent with the above case law and in the absence of statutory authority for the administrative law judge's finding, we hold that the Act does not allow for the reduction to present value of an annuity for Section 33(f) purposes. We therefore vacate the reduction to present value of claimant's annuity in the instant case, and modify employer's credit to provide for a $333,488.83 lump sum credit and a continuing credit of $500 per month from May 1985 as it is actually paid to claimant.[5]

---

5. We note that even if the administrative law judge's reduction to present value of claimant's annuity were in accordance with law, the sole evidence of the annuity's present value was the testimony of Mr. McClain, who testified that his economist told him the annuity cost $50,000. Cl. Ex. 28 at 26. As we have held, this type of evidence regarding the likely value of settlement components is legally insufficient. Furthermore, contrary to claimant's contention at oral argument, we need not remand the case for a determination of who is the payee of the annuity. The record evidence is uncontradicted that, while the annuity is payable to claimant or Nicole, claimant has been receiving the monthly payment. Tr. at 54-56.

Average Weekly Wage

Employer next challenges the administrative law judge's inclusion of $6,000 paid by decedent's employer into a tax-sheltered annuity (TSA) in calculating decedent's average weekly wage, alleging that it is a fringe benefit. Decedent was employed as a teacher by the San Ramon Valley Unified School District for the school year 1983-1984. His contract specified a salary of $29,976. Cl. Ex.3. Decedent, however, voluntarily elected to receive a salary of $23,976, as reflected on his W-2 statement for 1983. Cl. Ex. 4. The school district paid the remaining $6,000 into the TSA. Cl. Ex. 27. The TSA is a voluntary employee program of the school district that allows sheltering up to 20 percent of the employee's yearly income. Tr. at 65. The employer makes no contribution over what is deducted from claimant's salary, and the employee may make withdrawals at any time. Tr. at 65, 85-88. Income tax is paid in the year money is withdrawn from the TSA. Following decedent's death in February 1985, claimant placed the money in the TSA into her individual retirement account (IRA). Tr. at 65.

Section 2(13) of the 1984 Act, 33 U.S.C. § 902(13)(Supp. V 1987),[6] defines "wages" as:

> the money rate at which the service rendered by an employee is compensated by an employer under the contract of hiring in force at the time of the injury, including the reasonable value of any advantage which is received from the employer and included for purposes of any withholding of tax under subtitle C of the Internal Revenue Code of 1954 (relating to employment taxes). The term wages does not include fringe benefits, including (but not limited to) employer payments for or contributions to a retirement, pension, health and welfare, life insurance, training, social security or other employee or dependent benefit plan for the

---

6. We need not decide whether the 1984 Amendment to Section 2(13) applies in this case as the same result obtains under either the 1972 or 1984 Act. Pub. L. No. 98-426, 98 Stat. 1639, 1655, § 28(e) (1).

employee's or dependent's benefit, or any other employee's dependent entitlement.

Employer argues that the $6,000 is not within the amended Act's definitions of wages because it is a fringe benefit, it is not included for purposes of tax withholding, and it is not within any definition of wages in the Internal Revenue Code. Employer contends that under decedent's contract for hire in force at the time of the injury claimant was actually paid $23,976, and not $29,976 as found by the administrative law judge.

Employer's reliance on the Internal Revenue Code's definition of wages is misplaced. The Act explicitly defines "wages" for purposes of determining a claimant's compensation rate, while the Internal Revenue Code's definition is intended for purposes of taxation. While the Board may find instructive the Internal Revenue Code's definition of wages, it is not bound to apply a definition from another statutory scheme. See, e.g., Preziosi v. Controlled Industries, Inc., 22 BRBS 468, 471 (1989). We also reject employer's argument that the administrative law judge's finding is also not in accordance with the plain language of amended Section 2(13), which defines "wages" as including advantages subject to tax withholding. Payments to the TSA were exempt from taxation until withdrawn from the TSA account, and not included in decedent's W-2 statement. The plain language relied on by employer, however, does not explicitly limit wages to advantages subject to tax withholding. Section 2(13) merely includes in its definition of wages advantages subject to tax withholding. The plain language of Section 2(13), therefore, mandates that an advantage subject to tax withholding is a wage; however, it does not mandate that a benefit not subject to tax withholding is not a wage per se. The $6,000 was included in decedent's contract of hiring, Cl. Ex. 3, and that employer rather than decedent put the money into a TSA has no bearing on the fact that the money was intended to compensate decedent for his employment services. Accordingly, we hold that the administrative law judge correctly included the

$6,000 in decedent's average weekly wage as it constitutes "wages" as defined by Section 2(13) as amended in 1984.[7]

Lastly, we reject employer's contention that the $6,000 payment to the TSA constituted a fringe benefit excluded from the definition of "wages." In Morrison-Knudsen Construction Co. v. Director, OWCP, 461 U.S. 624, 15 BRBS 155 (CRT) (1983), the Supreme Court addressed the 1972 Act's definition of wages in reference to employer's contributions to union trust funds for health and welfare, pensions, and training. The Court held that Section 2(13) excluded an employer's contributions to a union pension fund that were based on a per man hour rate of 35 cents. The Court formulated a standard that "wages" include benefits with a present value that can be readily converted into a cash equivalent on the basis of their market value.[8] Morrison-Knudsen, 461 U.S. at 629-632, 15 BRBS at 157 (CRT). The fluidity of the TSA places it within the Court's definition of wages, as evidenced by claimant's ability to roll over the TSA into an IRA. See generally Lopez v. Southern Stevedores, 23 BRBS 295 (1990); McMennamy v. Young & Co., 21 BRBS 351 (1988). The Court applied its test to the union trust fund created by employer's mandatory 35 cents per manhour contribution and held that employer's contributions were a fringe benefit and not wages, reasoning that: the benefits could not be obtained on the open market through private insurance, receiving the benefits required the earning of pension credits relating to hours worked, and vesting was required. Morrison-Knudsen, 461 U.S. at 630-632, 15 BRBS at 157-158 (CRT). The TSA in the instant

---

7. For the same reason, the $6,000 is included in the definition of wages under the 1972 Act. Section 2(13) of the 1972 Act defines wages as:

> the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury, including the reasonable value of board, rent, housing and gratuities received in the course of employment from others than the employer.

33 U.S.C. § 902(13)(1982)(amended 1984). The $6,000 falls within the plain language of the 1972 Act, as it is included in the salary agreed to under the employment contract.

8. The amended Section 2(13) incorporated the Court's definition of wages in Morrison-Knudsen. See Denton v. Northrop Corp., 21 BRBS 37 (1988).

case has none of these features. It is similar to an IRA, which can be obtained on the open market. The TSA contribution was earned when paid, and it immediately vested. Accordingly, the payments to the TSA are not fringe benefits excluded from the definition of wages, and employer's contention to the contrary is rejected.

Attorney's Fee

Employer lastly challenges the award of an attorney's fee for work performed by claimant's attorney before the administrative law judge.[9] Employer contends that if it is successful in its appeal of the Section 33(f) credit issue, it would not be liable for an attorney's fee to claimant's counsel as claimant then will not have prevailed below since claimant, decedent and their daughter would never actually receive any compensation.

We reject this contention. Notwithstanding the amount of employer's credit, claimant's attorney is entitled to a fee for work performed at the administrative law judge level as entitlement to benefits under the Act was established. Claimant succeeded on the contested issues of causation, average weekly wage, extent of disability, and Section 33(g). Although claimant may never actually receive any benefits from employer due to the Section 33(f) credit, claimant successfully obtained an inchoate right to compensation under the Act. See McDougall v. E. P. Paup Co., 21 BRBS 204 (1984). We therefore affirm the administrative law judge's award of an attorney's fee to claimant's counsel.

Finally, we address the Director's contention made at oral argument that the administrative law judge erred by remanding this case to the deputy commissioner for calculation of

---

9. Claimant has filed a motion to dismiss employer's appeal of the administrative law judge's award of an attorney's fee on the ground that employer did not file a petition for review and brief in contravention of 20 C.F.R. § 802.211. Employer opposes the motion. We deny the motion to dismiss. A party is not required to file a petition for review and brief until the Board acknowledges the appeal, which the Board did not do. We hereby acknowledge employer's appeal of the administrative law judge's attorney's fee award, 20 C.F.R. § 802.210, and we will address the issues raised by employer in its response to claimant's motion to dismiss.

employer's credit among the successful claims of decedent, claimant and the daughter, and for the entry of an award. See Oral Argument Tr. at 36-37. In his initial Decision and Order Awarding Benefits, the administrative law judge's order paragraph states that "Benefits and offsets are granted as set forth above." Decision and Order at 17. In his Decision and Order on Reconsideration, after addressing the amount of employer's credit resulting from the stipulated judgment, the order paragraph states, "the matter is remanded to the deputy commissioner for the necessary computations and to issue a suitable award." Decision and Order on Recon. at 6. The regulation at 20 C.F.R. § 702.348 states that the administrative law judge's compensation order shall contain appropriate findings of fact and conclusions of law and shall be concluded with one or more paragraphs containing the administrative law judge's order. In this case the administrative law judge made the necessary findings of fact and conclusions of law so that the deputy commissioner was charged with making purely ministerial calculations. Thus, no error was committed.

Accordingly, the administrative law judge's Decision and Order, Supplemental Order Amending Decision, and Decision and Order on Reconsideration are affirmed insofar as they found that Section 33(g) does not bar the claims, and that the $6,000 payment to the TSA is included in decedent's average weekly wage. The decisions are modified to provide employer with a lump sum credit of $333,488.83, and a continuing credit of $500 per month, that shall offset any of its liabilities under the Act to decedent, claimant and their daughter. The administrative law

judge's Decision and Order on Original Attorney Fee Petition is affirmed.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

Dated this 28th day
of September, 1990

U.S. DEPARTMENT OF LABOR
Employment Standards Administration
Office of Workers' Compensation Programs
Longshore and Harbor Workers' Compensation
450 Golden Gate Avenue, Box 36022
San Francisco, CA 94102

[LOGO]

March 13, 1987

OWCP No: 13-75715

Re: Renate Cretan vs.
Bethlehem Steel Corporation
DOI: asbestos

Bethlehem Steel Corporation
P.O. Box 4127
Oakland, CA 94621-4127

Gentlemen:

The attached Decision and Order on Reconsideration for Judge Heyer requires that certain computations be performed by this office.

On page 4, Judge Heyer amends the allocation of the settlement. The 43.11% allocated to fees and costs is to be proportionately assessed. Additionally Judge Heyer directs that the stipulated judgment be allocated in the same proportion.

Settlement Allocation

	Gross	Fees/Costs	Net	Percent
Decedent	201,500.00	86,867.56	114,632.44	77.1
Widow	45,000.00	19,399.50	25,600.50	17.2
Daughter	15,000.00	6,466.50	8,533.50	5.7

Judgment Allocation ($234,722.65)

Decedent	150,971.16
Widow	40,372.30
Daughter	13,379.19

Entitlements are as follows:

Decedent

Settlement Judgment = 114,632.44
180,971.16
295,603.60
23,255.29 Compensation for Permanent
272,348.31

Medical costs may be applied by carrier to the credit of $272,348.31.

Daughter

Settlement Judgment = 8,533.50
13,379.19
21,912.69
7,037.48 Student benefits
Remaining credit $14,875.21

Widow

Settlement Judgment 25,600.50
40,372.30
65,972.80 Credit

02/26/85 - 09/30/85	31	weeks @ 288.23	=	8,935.13
10/01/85 - 09/30/86	52 1/7	weeks @ 296.00	=	15,434.29
10/01/86 - 03/13/87	23 3/7	weeks @ 301.00	=	7,052.00
				31,421.42

This leaves a credit still due of $34,551.38 which will take approximately 2 years to absorb.

If I can be of any further assistance, please feel free to contact me.

Sincerely,

JOHN SHARP
Assistant Deputy Commissioner
(415) 556-6297

cc: Mrs. Renate Cretan
Bill Parrish, Esq.
Victoria Edises, Esq.

ECL:#13:DB:tr

U.S. Department of Labor
(415) 974-0514
8-454-0514

Office of Administrative Law Judges
211 Main Street - Suite 600
San Francisco, California 94105

[LOGO]

In the Matter of

RENATE CRETAN [widow]
JOHN CRETAN [deceased]
Claimant

v.

BETHLEHEM STEEL CORPORATION
Employer

CASE NO: 85-LHC-2116

OWCP NO: 13-75715

DECISION AND ORDER ON RECONSIDERATION

PROCEDURAL HISTORY AND STATUS

This proceeding originally arose on a claim for disability compensation under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 9Ol et seq.; 20 C .F .R. Parts 701 and 702; and 29 C.F.R. Part 18. A major issue was the applicability and effect of 33 U.S.C. § 933 (f) and (g), if any, to this case. After trial in November 1985, the parties were allowed to, and did, submit a series of briefs in January, February, March, and April setting forth their positions and exploring recent law governing the effect on compensation under the Act of events in tort cases arising from the same facts.

The original decision issued on June 24, 1986, and was amended to correct an unintended omission by supplemental order on July 2. On July 17 the claimant petitioned for reconsideration of the tribunal's reading of the testimony regarding the elements entering into the settlement negotiations on the claimant's side, and the consequent allocation of the settlement amount the injured worker and his dependents under 33 U.S.C. § 933, and raised the question of admission of additional evidence. (The claimant also sought further attorney fees on July 21, and apparently the respondent employer appealed to the Benefits Review Board in

the meantime, but the board on October 10 dismissed the appeal as untimely in view of the request for reconsideration.)

On August 7, 1986 the respondent employer objected to reconsideration, but the tribunal, under the impress ion that pertinent new events might occurred and desiring a more complete explication of the parties' respective positions, any new pertinent evidence, and full exchange of arguments, allowed the parties additional time for further submissions, which have now been received. The matter is now again taken under submission, primarily to reexamine the facts pertinent to the allocation.

CLARIFYING AMENDMENT

Before proceeding to the consideration of issues raised by the post-decision pleadings, it appears desirable to clarify the second complete paragraph on page 15 of the original decision, beginning with the words "In this case ...", and ending "agreement itself." On re-reading, it is not entirely certain that this paragraph as published clearly expressed what it meant to say, and it contains one unintended expression. That paragraph is therefore here slightly rephrased to clarify better what was originally intended, to read as follows:

> In this case, however, evidence shows that the present claimant widow expressly agreed to waive a wrongful death claim. Such waiver does affect the employer's subrogation rights under the death claim. An offset therefore seems reasonable to apply to her. While the survivors' compensation claim for death under the statute is totally separate from the decedent's claim, as illustrated by regulation, the settlement expressly covered the potential future tort claim, and such settlements are permitted and enforced in the civil courts. Such settlements of future wrongful death claims must affect rights to compensation under § 933(g), even though "wrongfulness" is not an element of recovery under Long shore and Harbor Workers' Compensation Act, just as the injured worker's settlement of tort cases, which involve negligence (a form of wrongfulness), affect his

entitlement by offset under 933(g), even though the worker's own entitlement under the Act also does not involve the element of wrongfulness or negligence. The two situations appear parallel. Moreover, the evidence does suffice, by reason of the tort-attorney's testimony, to segregate the various elements of the settlement, even though these are not specified in the settlement agreement itself.

CONTENTIONS

The claimant's request for reconsideration urges that
(1) the evidence shows allocation of $30,000 of the original settlement each to the wife's (a) loss-of-consortium claim and (b) her potential wrongful death claim, and none to the daughter;
(2) nevertheless all of this $60,000 should be attributed to the claim for loss of consortium, because the wrongful death claim had not yet been filed and the cause of action had not yet arisen;
(3) hence no apportionment should occur; and
(4) the employer should not be allowed to offset the amount received under the stipulated judgment against entitlement of either of the living parties under the Long shore Act cited above [petition pp. 2-3].

The employer contends that the original findings correctly allocated the settlement, viewing the record as a whole and considering Mr. McClain's testimony that the daughter's potential recovery was "projected into the ultimate settlement figures" and the settlement itself was contingent on her signing [objection, pp.2-3] . The parties thereafter respectively filed a Supplemental Post-Trial Brief (September 5, 1986), a Supplement to Objection to Petition for Reconsideration (January 30, 1987), Claimant's Reply to Respondent's Supplement, etc. (February 20, 1987), and "Reply to Respondent's Reply ...", etc. (March 3, 1987, which, despite its heading, was filed by respondent).

ORIGINAL SETTLEMENTS

With respects to the original settlement amounts allocated in the original decision, the claimant argues the purport of the testimony, and also asserts that the allocation used improperly "equated the loss of consortium action with the wrongful death action", contrary to "California law", on the grounds that the bases of wrongful death actions and actions for loss of consortium differ under California law. The difference is real, and is consistent with the common law on the subject prevailing in most states of this nation, but is not particularly significant here.

As pointed out in the original decision, Congress has apparently chosen to disregard the difference between pain and suffering, on one hand, commonly known as "general damages", on one hand, and "special damages", including such items as wage loss and medical expense on the other. Thus, although only the latter is recoverable, and only partially, under the statute here in question, all of the above are meant to be recoverable in tort proceedings. Nevertheless Congress has evidently allowed all types of award, including general damages, to be offset against entitlement under the compensation statute. If this be so, there is not obvious reason that a finer distinction would be drawn between the recoveries that might be obtained in wrongful death and loss-of-consortium cases.

Respondent re-argues the question of whether allocation can occur at all, but urges in its stead an effective allocation of 100% to the survivors and none to the decedent, citing Brandt v. Stidham Tire Co., 16 BRBS 277 at 280 (1984), the same case on appeal, 18 BRBS 703 (CRT), and Judge Matera's decision in Dunham v. Bath Ironworks, OALJ Case No. 85-LHC-2380 (ALJ 1986). The first two, however, relate only to the question of pain and suffering to which allusion is made above and in the original decision, and is therefore not apt here. The reasons for my learned colleague's decision in the Dunham case are evident, but I do not think such a result is just or can be what Congress intended in situations like the present case.

(In this respect, the testimony was not parol evidence presented to add to, detract from, or vary the terms of the settlement agreement [Gregg v. U.S. Industries, Inc., 715 F.2d

1522, 1531 (11 Cir. 1983, 721 F.2d 345, cert. den., 104 S. Ct. 2173] , but to explain the purpose [Pennzoil Co. v. Federal Energy Regulatory Commission, 645 F.2d 360, 388 (5 Cir. 1981), cert. den., 102 S. Ct. 1000.)

For the reasons stated in the original decision, and as clarified here, the basic concept of allocation among the individuals involved, where the evidence suffices, is retained. Such allocation may not always be possible; it will sometimes be difficult. Where it is possible, judicial and quasi-judicial tribunals ought not shrink from hard tasks to accomplish legislative intent and render our system of laws as just as can be attained. On the other hand, the claimant's renewed argument against any allocation to the survivors is again rejected, also for the same reasons. It is sound and established that the employer cannot force the claimant into settling for a small portion of his entitlement and claim the result as an absolute bar, on the basis of the words "person entitled"; it is equally sound and appropriate that the survivor cannot escape offset against death benefits by signing away her right to wrongful-death compensation from a third party before the worker's death--such an interpretation would constitute an unbalanced and equally unjust misapplication of the words "person entitled".

It therefore becomes necessary to re-address the question of the proper interpretation of the precise language of the testimony regarding the application. On reexamination of the transcript, it appears the claimant is correct. The allocation with respect to the settlement proceeds is therefore amended from $201,500.00 to the decedent and $ 30,000.00 each for the two survivors, as originally stated, to $201,500 to the decedent, $45,000.00 to the widow, and $15,000.00 to the daughter, with proportionate amounts of the attorney fee deducted from each such allocation before offsetting the remainder against the current recovery.

The question of the annuity arises again, but the decision is unchanged in that respect, for the reasons originally stated.

STIPULATED JUDGMENT

At the time of the original decision, the proceeds of the stipulated judgment had not yet materialized, and it was unclear whether they would, and, if so, in what amounts, although the judgment itself was for a definite amount. The net amount of the recovery in that matter has now been paid to the claimant widow in the amount of $234,722.65 after deducting the attorney fee. The claimant would deny any offset of this amount, on the ground that the proceeding was based on the decedent's personal injury action and the widow's action for loss of consortium, and that the survivors were not "persons entitled to compensation" at the time when the settlements and stipulated judgment were formulated, citing Jones v. St. John Stevedoring Company, Inc.

The claimant Renate Cretan represents through present counsel that her counsel in the case in which the stipulated judgment was entered regarded wrongful death claims by the survivors as items of consideration "contemplated by the judgment", and therefore that the proceeds "should be apportioned in the same manner" as the settlement proceeds [claimant's supplemental post-trial brief, p. 6].

The respondent provided a copy of the stipulated judgment. Since the then-live injured worker was a party to the proceeding, it is reasonable to allocate at least some part of this settlement to him, if any reasonable basis for an allocation exists in the record. Since the judgment sets forth that the present survivors are to "release ... all claims ... including any potential wrongful death claims", and the claimant concedes such in its brief as mentioned above, at least some of the allocation should also be to those survivors. Despite the representations in the brief, there seems to be no actual evidence in the record on this point on which a finding could be based. Where the same parties and considerations appear to be present, however, the proper allocation would appear to be in the same proportions as under the settlement, in the absence of contrary evidence.

As respondents note, the resolution of the appeal, and the actual payments, occurred after the worker died. In itself, that is not a logical reason for altering the allocation. The numbers reached amounted to a settlement of sorts, although the parties

continued to litigate one aspect of the case. Those numbers were based, presumably, on the circumstances facing the parties at the time. The recovery of the decedent's share by the other parties is not materially or significantly different, in its ultimate nature vis-a-vis this case, from disability benefits payable under 33 U.S.C. § 908 during the worker's life. If he does not get them before he dies, though entitled to them, his successors or heirs may receive them, to pay for his bills or otherwise, and that payment would not be deducted from any death benefit to which a successor might be entitled under §909, for the simple reason that it would not be a double recovery.

Neither can it reasonably be argued that the present claimant's recovery of that portion of the settlement is any kind of double recovery here. The parties might have filed separate actions and had separate settlements and recoveries; such a procedure would clarify and simplify our task here, but would be against sound public policy, because it would tend unnecessarily to multiply and duplicate proceedings in the tort tribunals, causing needless public and private expense of time, money, and talent. Yet our effectively allocating the deceased worker's share of the agreed amounts to the survivors because a single settlement or stipulation was involved (on the excuse that it is not easy to segregate or allocate properly) would encourage just such a multiplication and duplication of proceedings. Such a wasteful and mechanical approach would be unworthy of this tribunal and of the standards of justice and reasonableness characteristic of the great common-law system.

The proper approach to the amounts recovered from the stipulated judgment is allocation in the same proportions as under the settlement, after allowance for the attorney fees.

The employer is accordingly entitled to offset under 33 U.S.C. § 933 the amounts of payments under the settlement in accordance with the allocations provided in the original decision, and likewise to offset the proceeds of the stipulated judgment in the same proportions, after making allowance for attorney fees and costs in both cases.

ORDER

The original decision is supplemented as set forth in the section entitled "Stipulated Judgment" above, clarified by the amendment set forth in the section "Clarifying Amendment" above, and otherwise affirmed as originally issued, except as modified by the order issued on July 2, 1986. Except as expressly stated here, the original decision shall stand as issued. The matter is remanded to the deputy commissioner for the necessary computations and to issue a suitable award.

ROBIN S. HEYER
Administrative Law Judge

Dated: MAR 09 1987

San Francisco, California

RSH:bjh

U.S. Department of Labor
(415) 974-0514
FTS 8-454-0514

Office of Administrative Law Judges
211 Main Street - Suite 600
San Francisco, California 94105

[LOGO]

In the Matter of

RENATE CRETAN, Widow of
JOHN CRETAN
Claimant

v.

BETHLEHEM STEEL
CORPORATION
Employer

CASE NO: 85-LHC-2116

OWCP NO: 13-75715

ORDER

The original decision in this case issued on June 24, 1986, (1) allowing recovery under the statute for each of the claimants, under 33 U.S.C. 908, 909, and 933; (2) allowing certain offsets against these recoveries under § 933; and (3) allocating the amounts and specifying the manner of these offsets. Subsequently, on July 2, 1986, a supplemental order issued, amending the original decision to correct an unintended omission, viz., to apportion the attorney fee paid in connection with the tort proceeding among the various claims, and allow proportionate reductions of the offsets in accordance with that apportionment and the intention of § 933(g) that the offsets should be net recoveries.

The claimant now (July 17, 1986) petitions for reconsideration, urging first that none of the settlement represented potential claims of the decedent's daughter and second that the stipulated judgment recovery was all in the personal injury and loss-of-consortium cases and therefore should not be apportioned to the survivor claims at all, or alternatively only proportionately.

Each party is allowed 20 days in which to submit copies of such transcript pages or other evidence already in the record, as may be deemed pertinent to these questions, together with any further relevant points and authorities.

The claimant's petition leaves the impression that the stipulated judgment amount has now been paid, and that it was arrived at in some manner different from the settlement amounts. I also have the impression that the daughter signed no documents related to the stipulated judgment. In the absence of further evidence or advice I would therefore expect to apportion the offset relating to the stipulated judgment amount in the same proportions as for the other amounts, except that (a) either the attorney fee has already been accounted for, or, if there was a further attorney fee, it presumably would be in a different amount; and (2) the daughter presumably was not a party to this additional proceeding and therefore none of that sum would be offset against any entitlement she may have.

Within the same time set forth above, the parties may submit their views on both the merits of the procedure mentioned in the preceding paragraph, proposed alternatives thereto, and any proposed further procedures to resolve such questions, together with any pertinent documentary evidence. At the expiration of such time, these matters will be taken under submission.

R. S. HEYER
Administrative Law Judge

Dated: AUG 13 1986
San Francisco, California

RSH:ccw

U.S. DEPARTMENT OF LABOR

Employment Standards Administration [LOGO]
Office of Workers' Compensation Programs
Longshore and Harbor Workers' Compensation
450 Golden Gate Avenue, Box 36022
San Francisco, CA 94102

July 11, 1986 OWCP No: 13-75715

Re: Renate Cretan, widow of John Cretan vs.
Bethlehem Steel Corporation

Bethlehem Steel Corporation
P.O. Box 4127
Oakland, CA 94621

Gentlemen:

As stated in the attached Decision and Order with Supplemental Order Amending Decision from Judge Heyer, benefits are due on account of the decedent, his widow and his daughter.

The Supplemental Order provides for the 3rd party credit to be reduced by fees and costs as provided by Section 33 of the Act.

Attorney Fee:	$ 99,177.46
Costs:	$ 13,556.36
	$112,733.82

These costs represent 43.11 percent of the recovery.

Judge Heyer apportions the recovery as follows:

	GROSS	FEES/COSTS	NET
Decedent:	$201,500.00 (x 43.11%)	$86,867.56	$114,632.44
Widow:	$30,000.00	$12,933.13	$17,066.87
Daughter:	$30,000.00	$12,933.13	$17,066.87

Entitlements per the Decision are as follows:

DECEDENT

Permanent Total Disability

01/07/84--09/30/84 38 2/7 weeks @ $384.31 = $14,713.58
10/01/84--02/25/85 21 1/7 weeks @ $404.00 = 8,541.71
$23,255.29

This amount when applied to the net credit leaves a balance of $91,377.15 against which medical costs may be applied by the employer.

DAUGHTER

Student Benefits

02/26/85--09/30/85 31 weeks @ $96.08 = $2,978.48
10/01/85--07/14/86 41 weeks @ $99.00 = $4,059.00
$7,037.48

When this amount is applied against the 3rd party credit of $17,066.87, a balance of $10,029.39 remains. Information in file indicates that Ms. Cretan graduated from a four year college this year and has no further entitlement.

WIDOW

Death Benefits:

02/26/85--09/30/85 31 weeks @ $288.23 = $8,935.13
10/01/85--04/11/86 27.47 weeks @ $296.00 = $8,131.74
$17,066.87

Compensation benefits are therefore due Mrs. Cretan effective 4/12/86 at the rate of $296.00 per week.

Please submit Form LS-208 showing appropriate payment.

If I can be of any further assistance, please feel free to contact me.

Sincerely,

JOHN SHARP
Assistant Deputy Commissioner

cc: Mrs. Renate Cretan
Bill Parrish, Esq.
Victoria Edises, Esq.

ECL#13:JS:ei

U.S. Department of Labor
Office of Administrative Law Judges
211 Main Street - Suite 600
San Francisco, California 94105

[LOGO]

Commercial (415) 974-0514
Government 8-454-0514

In the Matter of

RENATE CRETAN, widow of
JOHN CRETAN,
Claimant,

v.

BETHLEHEM STEEL
CORPORATION,
Employer.

CASE NO. 85-LHC-2116

OWCP NO. 13-75715

SUPPLEMENTAL ORDER AMENDING DECISION

Inquiry regarding the mode of computation required under the conclusions of law set forth on pages 16 and 17 of the original decision in this case has called to the tribunal's attention an unintended omission, which is corrected by the present amendment.

The fundamental proportional allocation indicated in the original decision stands, but the decision failed to allow for the attorney fee charged in the third-party tort proceedings. This fee was included in the total immediate settlement figure in the upper portion of page 16, but not allocated in determining the amounts of offset to apply on page 17. More correctly, the attorney fee should be, and hereby is ordered to be, apportioned among the three persons for whom recovery was obtained in the same proportions as their respective settlement amounts have been allocated. Since offset is of net recovery, excluding the attorney fees, the respective proportions of the total attorney fee apportionable to each recipient are to be deducted from their

respective allocated settlement amounts. Only the balances remaining after such deduction shall constitute offsets against their entitlement in this proceeding.

In all other respects, the decision shall stand as issued.

R. S. HEYER
Administrative Law Judge

Dated: 2 JUL 1986
San Francisco, California

RSH:csw

U.S. Department of Labor Office of Administrative Law Judges [LOGO]
211 Main Street - Suite 600
San Francisco, California 94105

Commercial (415) 974-0514
Government 8-454-0514

In the Matter of

RENATE CRETAN, widow of
JOHN CRETAN,
Claimant,

v.

BETHLEHEM STEEL
CORPORATION,
Employer.

CASE NO. 85-LHC-2116

OWCP NO. 13-75715

Victoria L. Edises, Esq.
Steven Kazan
A Law Corporation
171 Twelfth Street, Suite 300
Oakland, California 94607
For the Claimant

Bill Parrish, Esq.
Parrish & Moriarty
1750 Van Ness Avenue
San Francisco, California 94109
For the Employer

BEFORE: R.S. HEYER
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This proceeding arises on a claim for disability compensation under the Longshore and Harbor Workers'

Compensation Act, 33 U.S.C. §§ 901 et seq.; 20 C.F.R. Parts 701 and 702; and 29 C.F.R. Part 18. After trial in November, the parties were allowed to, and did, submit a series of briefs in January, February, March, and April setting forth their positions and exploring recent law governing the effect on compensation under the Act of events in tort cases arising from the same facts.

The issues presented for adjudication are:

1. Whether under 33 U.S.C. § 902(2) the decedent's injury occurred in the course and arose out of his employment with the employer identified above;

2. Claimant's average weekly wage at the time of the injury under 33 U.S.C. § 910;

3. The amount of loss of wage-earning capacity, if any, by reason of this injury, under 33 U.S.C. § 908(a), (b), or (c)(21);

4. The applicability and effect of 33 U.S.C. § 933(f) and (g), if any, to this case; and

5. The usual ancillary issues of attorney fees and litigation costs under 33 U.S.C. § 928, interest, etc.;

PRELIMINARY FINDINGS OF FACT

The parties have agreed and stipulated that:

1. The decedent, JOHN CRETAN, was employed at BETHLEHEM STEEL CORPORATION in its San Francisco shipbuilding and ship repair yard during the periods from March 10, 1942 through August 25, 1942, and from February 11, 1943 through March 8, 1943;

2. Jurisdiction over that employment is covered by the Longshore and Harbor Workers' Compensation Act, by reason of

the fact that this employment of the decedent was maritime employment (either shipbuilding or ship repair, or both) over navigable waters of the United States (on vessels afloat or on the ways, or both) as those terms are used in the Act;

3. This decedent was exposed to asbestos during some of this employment;

4. This decedent died from mesothelioma;

5. Respondent does not contest the medical theory linking this asbestos exposure to this mesothelioma in a causal relationship;

6. Respondent was the last and only maritime employer of this decedent, as the term is used in the Act;

7. These stipulations into which the parties have entered for purposes of the present litigation are to have no operative effect in any forum other than this one;

8. The decedent stopped working on January 6, 1984, and never returned to work after that date;

9. The reason for the decedent's stopping work as stated above was the mesothelioma;

10. The work which the decedent stopped as described in stipulation paragraph numbered 8 above was as full-time teacher under a contract of employment with the San Ramon Unified School District for the school year extending from July 1, 1983, through June 30, 1984;

11. Decedent's earnings during the 52 weeks immediately preceding his cessation of work as set forth in stipulation paragraph numbered 8 above shall constitute the premise or basis for determining his "average weekly wage"- as that term is used in the Act but the parties do not agree on what that amount was);

12. The decedent paid medical expenses (presumably for the medical condition mentioned above) out of pocket in the amount of $1,470.51;

13. Burial expenses for the decedent were $1,151.36;

14. The reasonable value of RENATE CRETAN's services in attending to the needs of decedent during the terminal phases of his illness is $6500, and these services were medically necessary;

15. RENATE CRETAN was a dependent of the decedent as specified under 33 U.S.C. § 902(16); and

16. NICOLE CRETAN was the daughter of the decedent, was over the age of 18 years at the time of his death, and was at that time and to the time of the hearing a full-time student as defined by 33 U.S.C. § 902(18).

In addition, the claimant contends and the respondent concedes that the decedent was unable to work after January 6, 1984, but disputes disability under the Act on the basis of continuance of his salary. The claimant and respondent differ on the amount of earnings constituting the basis for computation of the average weekly wage, as mentioned in stipulation paragraph numbered 11 above, as between $29,976 and $23,976.

The decedent died on February 25, 1984.

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON DISPUTED ISSUES

Causal Relationship

Technically, as the claimant points out, the issue arises here whether the illness mentioned above resulted from the employment, because the employer, while not disputing or denying the allegation that the illness did so arise, has not stipulated or agreed that it did. Thus, although no controverting evidence or argument is offered, the claimant still must make a prima facie showing to establish this necessary link in the chain of causation between the employment and the disability and death which constitute the grounds for the claim of compensation.

The maritime employment mentioned above exposed the decedent to asbestos, and medical opinion in the record

establishes that "it is medically probable" that this exposure caused the decedent's mesothelioma [claimant's exhibit 7, page 5]. The views of Drs. Horn [claimant's exhibit 10, p' 7] and Schonfeld [claimant's exhibit 11, p.13] are consistent, although they use different phraseology.

This disease caused the decedent's subsequent inability to work after January 6, 1984, and ultimately caused his death on February 25, 1985. The causation issue is therefore resolved in the claimant's favor.

Average Weekly Wage

The next question is that of average weekly wage, as defined in 33 U.S.C. § 910 and used in § 908. This turns entirely on the claimant's earnings in the year immediately preceding his cessation of work mentioned above, when his condition was manifested by inability to work and diagnosed. The only dispute here is: What did he earn in that period?

The contract under which the decedent worked during the 1983-4 academic year extended from July 1, 1983 through June 30, 1984, and provided for a salary of $29,976.00 [claimant's exhibit 3, set forth in the time-honored contractual form of offer and acceptance]. This document, however, does not explicitly set forth the rate or timing of payments (e.g., whether in 10 or 12 payments). It may be inferred that payment for only the elapsed portion of the contract occurred by the time the services discontinued.

The school district report to the internal revenue service for 1983 wages shows $23,976.00 [claimant's exhibit 4]. The claimant says $29,976 was the actual payment, and explains the $6000 difference as resulting from placement of a substantial amount in a tax-deferred retirement account and therefore not reported as current income for tax purposes [trial brief, page 5]. Claimant's exhibit 27 supports this contention.

Thus, the contract is inconclusive, because part of the period in question (January through June 1983) was under a former contract, which has not been introduced into evidence,

and might be reasonably expected to provide for payment at a lower rate than that of the 1983-4 school year, but the more precise and complete school district report of November 19, 1985, confirms that earnings for the first half of calendar 1983 were equal to those of the second half, even though partially tax sheltered.

The tax-shelter aspect is irrelevant to the issues here. The wages earned in the crucial period are accordingly found to have been $29,976, as claimant alleges, not $6000 less, merely because less was taxable. The average weekly wage was therefore this figure divided by 52 weeks, which I calculate as $576.46.

(Although the executory contract for the school year 1984-1985 was also received into evidence, these future potential earnings are not material in this case [see respondent's Trial Brief, submitted in November, 1985, pp. 3-4].)

Disability

It is undisputed that the decedent was, because of the mesothelioma, unable to work after January 6, 1984, but his then employer, the school district, continued to make payments to him for another year at the same rate as his wage. On this basis the employer respondent ship builder contends that compensation is not due for periods before 1985, arguing:

> "Clearly, if claimant is drawing his full salary, then he is capable of drawing his full salary. Thus he is not disabled such as to entitle him to compensation payments. Compensation in non-scheduled injuries is not granted for impairment but only for disability. To award compensation would be to provide a double payment such that the claimant would profit from his condition. It is the intent and purpose of the Longshore & [sic] Harbor Workers' Compensation Act to replace lost wages, not to create them" [ibid., p. 5].

These payments "have been variously" characterized, as respondent points out, as

> "full regular salary", "sick-leave payments, disability payments, salary continuation payments, etc. The term chosen to refer to these payments is irrelevant. Those payments were made by the employer to the employee while he was employed, and as part of the employment cont[r]act."

Respondent reasons that the claimant thus "lost no earnings until ... 1985" [Post-Trial Brief, p. 7]. Respondent would distinguish these payments from a credit under 33 U.S.C. § 914(j) and from "a disability income policy purchased or provided separately, ... [or] state disability income benefits for which he had contributed through payroll deductions" [ibid., pp.7-8]. Neither party has cited any precedent on this issue.

Certainly, when the claimant was drawing his full salary, he was capable of drawing his full salary, and the present case does involve non-scheduled injuries. Respondent misreads, however, the meaning of the terms "impairment" and "disability". Impairment is the functional limitation, such as reduced ability to lift, think, etc., imposed by a medical pathology or abnormality. Disability is the "incapacity [in the case of total disabiiity, or the reduction in capacity, in the case of partial disability] because of injury to earn the wages which the employee was receiving at the time of injury" [33 U.S.C. § 902(10)].

In this case the abnormality or medical pathology was the presence of mesothelioma. The precise impairment consisted of the medical limitations which that condition imposed upon the former worker. Those medical limitations, whatever they were, prevented him from working. Inability to work is disability under the statute here applied. (Other inabilities caused by the same impairments, or other impairments caused by the same medical condition--such as inabilities to engage in athletics, or to enjoy family or other pleasures, etc.--are not material to entitlement under this program). When the claimant became unable to work,

he became unable, in the words of the statute, "to earn wages" [emphasis added].

As respondent itself at one point explains, the term used to characterize the payments received after work stopped is not the crucial factor. Merely calling this money "wages" is not determinative. The crucial expression in the statute is "incapacity to earn". When the decedent became unable to work, he became unable to earn. He therefore became disabled and entitled to benefits under the statute.

His receipt of money after that is immaterial. This money was not a wage earned by work done after January 6, 1984; it was in the nature of an insurance benefit, earned by activity before January 7, 1984, and payable in lieu of wages. It was a kind of disability insurance, paid for by earlier work, just as truly as if the decedent had contracted and paid for this insurance entirely separately through some private insurance carrier. Whether it was separately arranged for, or paid directly by the decedent to a third-party insurer with money which he earned and received from his employer, or the employer funded it directly, with or without the decedent's separate contribution, or the employer did not fund it but merely continued the payments, makes no substantive or meaningful difference. These are all economic, practical, philosophical, and, for our purposes here, legal equivalents. They are merely different ways of describing the same fundamental arrangement.

This arrangement, while it may have paid a full replacement of the wage, rather than a partial one, nevertheless did not amount to a wage earned by work done after January 6, 1984. The decedent's entitlement to draw this benefit did not constitute ability to earn wages. He was totally disabled beginning on January 7, 1984.

Public policy against double recovery does not apply in this case, because there is no genuine double recovery. The private insurance contract between the decedent and his school district employer was part of what he had already earned before his disability, and was a form of temporary disability compensation, similar to what California, four other states, and

the Commonwealth of Puerto Rico provide, and may not be offset against compensation under the Act being applied here. Many individuals have such private insurance, which sometimes has its own provisions for reduction by reason of public injured-employee benefits such as compensation under this statute, and sometimes do not have such provisions. Certainly it cannot seriously be contended here that there was any public policy consideration to prevent temptation to malinger--the decedent died of his condition, and doubtless would have gladly foregone the payments in return for continued good health.

It is true that the statute provides, reasonably, for an offset under § 914(j), where the employer respondent has advanced money. In such a case the respondent employer should not be required to pay twice--if it continues the equivalent of wages, even after inability to work, that amounts virtually, as reasoned above, to a kind of disability compensation. Where it is not required by another contract, as for some sort of fringe benefit, but is merely volunteered, the same employer should not pay more than the wage amount, merely because, at the time of initial payments, it did not call them compensation payments. This is consistent with what has been said above--the substance, not the characterization, must govern.

In this case, however, as the claimant points out, the wage continuation benefits were not paid by the employer respondent, but by a different employer. While the respondent argues that the decedent ought not to receive a wind fall in the form of compensation payments required by law and sick-leave payments provided by his contract of hire, the tribunal is obliged to conclude that the employer respondent is not entitled to a windfall in the form of relief from its normal obligation, merely on the basis of the coincidence that some other employer fulfilled the terms of contract of employment.

Finally, with respect to disability, it becomes necessary to classify the disability in terms of duration as well as severity. In severity, it totally prevented continued employment, so it was total disability. With respect to duration, temporary disability commonly arises after a traumatic injurious exposure injury, during which the injured employee is treated and recovers from

the immediate effects of the injury, to the extent that he can, reaches maximum medical improvement, and therefore his condition stabilizes into either full recovery or partial or total disability. In the case of an occupational disease, however, as here, no such traumatic onset or period of improvement necessarily occurs, and none is shown here. The decedent therefore was permanently totally disabled under 33 U.S.C. § 908(a) from January 7, 1984, until his death.

Effect of Tort Proceedings

Both parties have assisted the tribunal with extensive argument and citation, set forth in eight separate submissions, regarding the effect of tort proceedings against a third party on the claimant's entitlement to compensation under the statute cited above.

Facts

The decedent and his wife, claimant here, brought separate civil tort proceedings against other parties. Neither the decedent nor the present surviving claimant were parties to each other's suits. In settlement of these proceedings, the defendants received release of all existing and potential claims, of both plaintiffs and of their daughter Nichole, including personal injury, loss of consortium, and wrongful death, although the decedent was still living at that time. The settling defendants were in return to pay a total gross amount of $210,000, plus a guarantee of $160,000 more under a "Mary Carter" agreement, as described below.

Decedent and his wife, the present claimant, received a net settlement of $98,766.18 cash and a $50,000 annuity, payable at $500 monthly to the wife, or after her death to the daughter, if then living [respondent's exhibit 10, page 10, lines 11-19, and 22-25], and, if both should die, for a minimum time, presumably to the estate [respondent's exhibit p.26, 11. 10-19]. Respondent estimates, regarding the payments under the annuity, that the daughter "has a life expectancy of 58.7 years which provides for an anticipated payout of $352.000.00" [sic], i.e., $352,000, of which $4000 has been paid [post-trial brief, January 1986, p. 9].

Legal proceedings continued against one defendant which did not settle. The settling defendants, under the "Mary Carter" agreement, undertook to compensate the decedent and wife for any amount by which, when those continuing legal proceedings should be ultimately resolved, the plaintiffs involuntarily received less than $160,000. In other words, if the plaintiffs should proceed with all possible legal steps, exhaust all legal remedies including appeals, and should still lose the case, or win less than $160,000, the settling defendants would make up the shortfall, but not if plaintiffs settled for less with the remaining defendant. The proceeding remained unresolved when this case was taken under submission by the present tribunal, and no payments accordingly had been made under this provision.

To the latest time noted in the record, the actual distribution to the plaintiffs had consisted of the $98,766.18 cash and the annuity [respondent's exhibit 10, p. 10, lines 20-25]. Litigation costs were $13,556.36, and attorney's fees $99,177 and some change [ibid., p.11, lines 2-3]. The settlement was "for all claims jointly [with] a lump sum", but "in [the] negotiations the personal injury case of [decedent] was overwhelmingly the most valuable part of this settlement, without a doubt", largely because of the potentiality of an award for pain and suffering, according to the attorney in that case, who gave figures in comparable cases suggesting that the typical fair apportionment would be 90% to the (now) decedent and 10% to the survivors [ibid., lines 6-25; see also pp. 11-12].

He estimated the loss of consortium and potential wrongful-death causes of action as worth perhaps $30,000 each, and the pain and suffering of the decedent as approximately $170,000, with roughly another $30 attributable to economic loss (wages, medical expense, etc.). He was unable to assign any amount to punitive damages, within the total settlement figure [pp. 12-15]. The payments went to the decedent and his wife, not to his daughter.

Another settlement of $1500 was also mentioned, and what in effect was a third settlement resulting in a stipulated judgment, the "amount" of which was ordered "not [to] be disclosed by the parties or the attorneys ... " by order of the

Superior Court of the state of California [respondent's exhibit 8], but the amount of which has become known to this tribunal, in view of the federal statute discussed below. The stipulated judgment has, however, been appealed, in accordance with its provision that defendant there could appeal the issue of its successorship, in interest and obligation, to an entity with a different but similar name. The present tribunal has not been advised that ruling on appeal has yet occurred, and evidently no payments have been made on the basis of this appealed judgment, nor is any imminent.

During these negotiations and until notified of the first settlement described above, respondent here was disputing decedent's right to compensation and had not yet paid any compensation. At that time, the 1984 amendment to 33 U.S.C. § 933(g) had not yet become effective.

Contentions

Allowing for attorney fees and costs, respondent contends on the foregoing bases that "claimants herein ... will collectively receive or have received ... $94,000.00 ... plus $352,200.00" plus at least $96,000 by reason of the $160,000 settlement guarantee regarding the case now on appeal, in addition to a potential additional amount in the event of success in the case pending on appeal, and the respondent "has both a statutory and an equitable lien" on those proceeds, entitling it to a credit of $542,200.00 immediately, before any benefits are owed by it under the statute, and an additional sum "to apply contingent on the outcome of the appeal ..." [trial brief, pp. 6-8], under 33 U.S.C. § 933(f).

Even beyond that, respondent urges that 33 U.S.C. § 933(g) (2) totally bars recovery, on the ground that the claimant "entered into a settlement with defendants in the tort proceedings without obtaining the approval of the employer" [ibid., p.9], especially under the 1984 amendments, and gave no notice of stipulated judgment.

The employer would deny any distinctions, in the employer's right to reimbursement from recoveries against third

parties, based on the particular persons to be benefited or the types of damage being compensated, citing U.S. v. Lorenzetti, 104 S. Ct. 2284 (1984); Haynes v. Rederi A/S Aladdin et al., 362 F.2d 345 (5 Cir. 1966); Peters v. North River, etc., 764 F.2d 306 (1985); and other cases.

The claimant, on the other hand, counters that, "[b]ecause Bethlehem has never paid compensation to [the decedent, he] ... was not required to obtain its approval of his third party settlement in order to preserve his rights under the Act", citing O'Leary v. Southwest Stevedoring Co., 7 BRBS 144 (1977); Caranante v. International Terminal Operating Co., Inc., 7 BRBS 248 (1977); and Kahn v. Arrow Contractors, 15 BRBS 212 (1982), regardless of the 1984 amendments [Wilson v. Triple A Machine Shop, 17 BRBS 471(ALJ) (1985)], and, in any event, the survivors (present claimant and daughter) were not "persons entitled" to the death benefit during the decedent's life, when the settlement and stipulated judgment arose, and their separate claims therefore could not be affected by those proceedings [citing § 933(g); the O'Leary case; Puig v. Standard Dredging Corporation, 559 F. 2d 467 (1 Cir. 1979); and 20 C.F.R. § 702.241].

In addition, the claimant urges apportionment of the total settlement amount, so as to exclude from the offset under subsection (f) those amounts attributable to factors other than loss of wage-earning capacity and medical expenses, comparing Brandt v. Stidham Tire Company, et al., 16 BRBS 277 (1984), arriving at 11% of the settlement, or $55 per month.

Law

The Longshore and Harbor Workers' Compensation Act, as it is now known, was amended on September 28, 1984 [Pub. L. No. 98-426], effective with respect to cases pending on the date of enactment as well as those filed later, except where otherwise specified [ibid., § 28(a)]. 33 U.S.C. § 933 was not such an exception.

Section 933 states, in pertinent part:

(a) If an [sic; presumably means "on"] account of a disability for which compensation is payable under this Act ... some person other than the employer or a person ... in his employ is liable in damages, [the injured worker] need not elect ... compensation or ... damages ...

(b) Acceptance of ... compensation under an award ... shall operate as an assignment to the employer of all [claimant's] right to ... damages ... unless [the claimant] shall commence an action against such third person within six months after such award....

(e) Any amount recovered by [the] employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

(1) The employer shall retain an amount equal to--

(A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee ...);

(B) the cost of all benefits actually furnished by him to the employee under section 907;

(C) all amounts paid as compensation;

(D) the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by the Secretary [of Labor], and 'the present value of the cost of all benefits thereafter to be furnished under section 907, to be estimated by the deputy commissioner, and the amounts so computed and estimated to be retained by the employer as a trust fund to pay such compensation and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the [claimant]; and

(2) The employer shall pay any excess to the [claimant], less one-fifth of such excess which shall belong to the employer.

(f) If the person entitled to compensation institutes proceedings within [the prescribed six months under subsection] (b), the employer shall ... pay as compensation under this Act a sum equal to the excess of the amount which ... is payable on account of such injury ... over the net amount recovered against such third person. Such net amount shall be equal to the actual amount recovered less the expenses reasonably incurred by such person with respect to such proceedings (including reasonable attorney's fees).

(g) (1) If compromise with such third person is made by the [claimant] of an amount less than the compensation to which [the claimant] ... would be entitled ... under this Act, the employer shall be liable for compensation as determined in subdivision (f) only if the written approval of such compromise is obtained from [respondents] ...

(2) If no written approval of the settlement is obtained and filed as required by paragraph (1) or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this Act shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this Act.

(h) ... the insurance carrier shall be subrogated to all the rights of the employer ...

Analysis

First, the parties dispute (1) when the settlement with most of the defendants in the tort case occurred, (2) whether the 1984 statutory amendment to § 933 governs in this case, and (3) whether it alters the result from prior case law.

As to date, decedent's tort-trial counsel testified to settlement on September 13, 1984, slightly before the effective

date (September 28) of the amendment. Court notes first memorialize the fact of settlement on October 1, on a continued session from September 26, but the phraseology leaves doubt whether the parties were just then settling, or merely reporting an earlier settlement. The settlement documents were not signed until October 25. These documents do not preclude an earlier oral agreement, but a court session on September 26, with report of settlement first noted at the following session, implies that settlement had not occurred before September 26, which appears to refute counsel's recollection. The contemporary documents are more persuasive of dates than counsel's memory, which is not shown to have been assisted by any external aid or note. If his memory is not correct, then the first actual evidence of agreement is October 1, after the effective date of the statutory change.

The statutory language makes the amendment to this section effective with respect to cases pending, i.e., already filed, on September 26; in that sense it would apply to the present case. Nevertheless it would not reasonably apply to agreements made before the effective date, if the law was changed as to those agreements. In this case, the new law was in effect when the agreement was reached, so the agreement was subject to the new version of the statute.

As to the meaning of the amendment to subsection (g), strict logic and literal reading of statutory language do tend to support respondent's position on Construction of the phrase "person entitled to compensation". Entitlement is literally a matter of law, applies immediately upon injury, and is independent of anything the employer does or does not do. Nevertheless, such a literal application here would clearly defeat the purpose of the statute, which is to provide prompt and certain compensation to the injured worker, "when his need is greatest" [Peters case, cited above, at p. 310].

A recalcitrant employer, under the literal interpretation, could decline to compensate and simultaneously decline to approve settlement with the third party, thus forcing the wage-dependent (and wage-less disabled) employee to settle for a fraction of his entitlement or do without, and let his dependents go without. Indeed, in this very case, the employer did decline to

recognize or fulfill its obligation in a timely manner, and insisted on showing at hearing that, had it known timely of the proposed settlement, it would have declined to approve it.

The tribunals charged with applying this provision have therefore consistently limited the phrase "person entitled to compensation" to persons actually receiving, or already adjudicated to be entitled to receive, compensation under the statute [O'Leary, cited above]. Although respondent contends that the new paragraph (2) of subsection (g) is intended to overrule this holding, the uniform views of my learned colleague Judge Schneider in Wilson v. Triple A Machine Shop, 17 BRBS 471 (ALJ)(1985); the new regulations, as especially clarified in their preamble; and the Benefits Review Board in Dorsey v. Cooper Stevedoring Company and INA, BRB No. 82-827 (1986), and the legislative history, persuade me that the only change intended and enacted by Congress in 1984 in subsection (g) was a requirement that, in cases not previously covered by the settlement-approval requirement, the claimant must, on peril of losing his entitlement altogether, give notice of a settlement or judgment after the event. This new requirement applies without regard to whether the employer has been making payments under the statute.

With respect to the October 1, 1984, settlement agreement, therefore, the lack of prior approval is not material in this case, because the employer never paid any compensation. That is true with respect to the decedent's claim, his wife's claim and his daughter's claim.

The next question becomes: When must the notice be given? The statute does not say. The purpose of the provision presumably is to facilitate the application of the subsection (f) offset provisions. Notice within sufficient time to apply those provisions would therefore appear to suffice, which essentially means before either initial adjudication of the entitlement to benefits or voluntary payment of benefits, or, if voluntary payment began before the settlement or tort judgment occurred, then within a reasonable time to avoid significant loss or prejudice to the employer.

In this case, since the employer paid nothing, it has suffered no loss from delay in learning of the events. The original tort attorney gave no notice, but the employer knew of both settlement and stipulated judgment before paying anything, or coming to trial for the adjudication of its liability for compensation payments. Once it knew, any further notice would be a useless act, and therefore not required, since the law does not require useless acts. If the case had gotten to the present trial without such notice or independent learning of the settlement, or if the employer had volunteered prompt payments as contemplated by the statute, the delay in, or lack of, after-the-fact notice would bar the decedent's claim altogether, but neither of those circumstances occurred here.

With respect to the stipulated judgment, the reasoning would be similar, with one exception. The judgment is not final, but is pending on appear; no award has therefore actually been paid. Since the respondent knows of this judgment long before there can be any payment, and is therefore in a position to protect its interest fully under subsection (f) with respect to it, the paragraph (2), subsection (g) bar could not apply here on this basis, even if the analysis of the preceding paragraph were found to be unsound. (Of course, bar would apply if the notice requirement were meaningfully and effectively violated regarding either the settlement or the judgment--it would not be necessary to establish violation of both.)

For the foregoing reasons, subsection (g) does not bar recovery by the decedent on his own account. The decedent's wife (the present claimant) and her daughter are not barred by subsection (g) for the same reasons. In addition, the settlement provisions of subsection (g) cannot apply to them, because the settlement was made when the decedent was living. They therefore could not claim a death benefit at that time, and could not by any stretch of the imagination be "persons entitled" to death benefits when the decedent was living, since their claims are separate [Puig v. Standard Dredging Corp., 599 F.2d 467 (1 Cir. 1979); Jones v. St. John Stevedoring Co., BRB Nos. 85-316 and 85-316A (1986), slip opinion p. 6, top of page].

Since no absolute bar applies, the application of the subsection (f) offsets must be considered. Before addressing individual claims, it is necessary to determine whether some kind of composite claim or offset approach is necessary, as respondent contends. It is already well established that the death claim and the disability claim are totally separate causes of action, arising under different statutory provisions, at different times, for different amounts, based on different standards of entitlement, and due to different beneficiaries. One of these beneficiaries cannot bargain away or otherwise affect the claim of the other. The claims are totally separate. To lump them together therefore seems inappropriate.

It may be that in some cases the evidence would not facilitate a segregation. In that instance, a settlement during life might normally be assumed, as in the Jones case, to refer only to the disability claim. The entire amount of the settlement would then be applied to the disability claim, and not to the survivors claims. There is some reason to do that here, as well, because, as tort-trial counsel testified, the other family members ordinarily sign the settlement documents as an accommodation to the disabled worker, to assist him in getting a settlement for himself, and take nothing for themselves separately. Certainly that would normally be the presumption, in the absence of contrary proof.

In this case, however, evidence shows that the present claimant widow expressly agreed to waive a wrongful death claim. Such waiver does affect the employer's subrogation rights under the death claim. An offset therefore seems reasonable to apply to her. While the compensation claim for wrongful death under the statute is totally separate, as illustrated by regulation, the settlement expressly covered the potential future tort claim, and such settlements are permitted and enforced in the civil courts. Moreover, the evidence does suffice, by reason of the tort-attorney's testimony, to segregate the various elements of the settlement, even though these are not specified in the settlement agreement itself.

The employer argued against such segregation, and the Board has not yet made such. Its refusal, however, was based on lack of evidence and the necessity of speculation. Here, there is

evidence and no need of speculation. Moreover, although employer refers to this evidence as self-serving and undependable, that is no legal reason to exclude self-serving evidence, only to be cautious in believing it. In this case the testimony was expressed in terms of general principles of evaluation of tort cases, well known to the legal profession, and easily rebutted if erroneous. No rebuttal evidence was offered, even though the compensation trial occurred after the deposition at which this testimony was taken. I find that testimony entirely credible.

It is quite plausible, and in fact a matter of common knowledge throughout the legal profession and, in California, the general public (consider the recent debate over proposition 51) that awards for pain, suffering, and other elements of what are commonly called "general damages" normally exceed those for "special damages" (actual out-of-pocket economic damages) by a factor of several times.

The segregation is therefore recognized, the testimony accepted, and the settlement found to consist of the amounts set forth below:

> A total immediate settlement amount of the following amounts, together with a guarantee or contingent liability of up to $160,000 later, depending on the eventual outcome of the case now pending on appeal:
> $98,766.18 net cash recovery;
> 99,177.46 attorney fee;
> 13,556.36 litigation costs;
> 50,000.00 annuity;
> $261,500.00 total immediate settlement
>
> which in turn consisted of amounts fairly apportionable, though not then agreed to be apportioned, as follows:

(1) $170,000 for the decedent's pain and suffering;
(2) 30,000 for the decedent's economic losses;
(3) 30,000 for the widow's current claim of loss of consortium and her potential wrongful-death claim;
(4) 30,000 for any potential claims of the daughter; and
(5) 1,500 unaccounted for in the testimony.

These figures coincide with much of the testimony. It is also true that the witness at one point attributed a larger proportion to the decedent's pain and suffering, but the size of the annuity tends to support his more specific figures shown here, because it was to be payable to wife and daughter, and approaches the total of their shares as described in (3) and (4) above. In view of the heavier proportion suggested in the earlier testimony for the pain and suffering, the extra $1500 is attributed also to that aspect.

As noted above, failure to segregate here and on this record would be inappropriate, even though the parties did not, because each was giving up something which, though surrendered in a single transaction which was not (practicably) separably negotiable in the tort proceedings, is distinct and non-mergeable under the statute applied here. State courts commonly do make such segregations in similar circumstances, as may be officially noticed and indeed described by counsel, and so here must this tribunal.

The annuity is above treated, as it must be, in accordance with its current value. The statute provides for a recovery of current commuted value of future medical costs, as mentioned above, and in general current value in dollars obviously is very different from a summation of the prospective future earnings of any investment, including an annuity. This tribunal refuses to speculate on how many payments the parties may in the future receive from the annuity, or how much of this will go to the daughter during a period when she is not entitled to compensation under the Act, or to the widow, or what the dollar will be worth in the future. The present value of the annuity, as revealed by the

evidence, is the correct amount to offset against entitlement under the statute.

On the other hand, even though most of the decedent's recovery was for an element of damage not compensated under the statute, it appears that Congress so intended; therefore, the entire amount of his settlement recovery must be offset against his entitlement under the statute [cf. U.S. v. Lorenzetti, 104 S.Ct. 2284 (1984)].

Accordingly, in this proceeding, $201,500 of the immediate settlement is hereby allocated to the decedent, and offset under 33 U.S.C. § 933(f) against any amounts for which the employer may be liable or may have paid in health-care assistance under 33 U.S.C. § 907 or weekly benefits under §§ 908.

Similarly, the employer is entitled under § 933(f) to offset against its liability for benefits under § 909 the sum of $30,000 for the widow's current claim and in the same way the sum of $30,000 from any payments under the statute for the daughter mentioned above. The employer is not liable for payments to the widow-claimant until the $30,000 settlement has been offset as to her, and is not liable to the daughter until the $30,000 settlement herein allocated to her has been offset.

Thereafter, the employer may offset such sums, if any, as shall by then have been paid pursuant to final resolution of the case involving the stipulated-judgment, but, if that matter is not yet resolved when the offsets set forth in the two preceding paragraphs have been exhausted, the employer shall pay such amounts, if any, as the statute would otherwise require, pursuant to the findings reached in the earlier sections of this decision.

In addition, the claimant is entitled to reasonable attorney fees and costs in the present proceeding under § 928, if request for payment is promptly submitted and properly documented.

ORDER

Benefits and offsets are granted as set forth above. Employer shall have 20 days in which to respond to any attorney fee petition which may be submitted.

R. S. HEYER
Administrative Law Judge

Dated: JUN 24 1986
San Francisco, California

RSH:mf